

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

KATHARINE L. POLZKILL)	
Claimant)	
VS.)	
)	Docket No. 183,435
KANSAS PUBLIC SERVICE)	
Respondent)	
AND)	
)	
ST. PAUL FIRE & MARINE INS. CO.)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent requested Appeals Board review of Administrative Law Judge Brad E. Avery's March 22, 2000, Award and the Administrative Law Judge's March 23, 2000, Award Nunc Pro Tunc. The Appeals Board heard oral argument on August 30, 2000.

APPEARANCES

The claimant appeared by her attorney, John M. Ostrowski of Topeka, Kansas. The respondent and its insurance carrier appeared by their attorney, Patricia A. Wohlford who appeared for Kristine A. Purvis of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Derek J. Shafer of Topeka, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award and Award Nunc Pro Tunc.

ISSUES

On March 11, 1997, Administrative Law Judge Floyd V. Palmer entered an Agreed Award that had been approved by all parties. The Agreed Award was for an October 9, 1991, work-related accident that injured claimant's back and both knees. The Agreed Award called for the payment of nine weeks of temporary total disability compensation and permanent partial general disability compensation based on claimant's 19.33 percent permanent functional impairment.

On October 9, 1997, claimant filed an Application for Review and Modification of the March 11, 1997, Agreed Award. Claimant alleged the original award should be modified because both claimant's physical and work disability had increased. Also, claimant alleged she was in need of additional medical treatment directly attributable to her work-related October 9, 1991, accident.

In the March 22, 2000, Award and March 23, 2000, Award Nunc Pro Tunc, the Administrative Law Judge modified the original Agreed Award from the 19.33 percent permanent partial general disability, based on her permanent functional impairment, to a 53.5 percent permanent partial general disability based on a work disability.

Respondent appealed and requests the Appeals Board to reverse the Administrative Law Judge and deny claimant's request to modify the March 11, 1997, Agreed Award. Respondent contends claimant failed to prove that her disability had increased. Respondent further argues, if the Appeals Board should affirm the Administrative Law Judge's modification of the Agreed Award, the Administrative Law Judge erred in computing the modified award. The Administrative Law Judge computed the award based on the increased permanent partial general disability of 53.5 percent for the remaining 98.43 weeks left from claimant's date of accident but failed to credit respondent for the temporary total disability compensation and permanent partial general disability compensation previously paid.

Conversely, claimant argues the Administrative Law Judge's conclusion that the March 11, 1997, Agreed Award should be modified to a 53.5 percent work disability should be affirmed. But claimant also contends that, as a result of her October 9, 1991, accident, she was temporarily and totally disabled from performing substantial and gainful employment from April 9, 1997, through January 1, 1998. Thus, claimant argues she is entitled temporary total disability weekly benefits for those weeks at \$289.00 per week and then entitled to a 53.5 percent work disability for the balance of the disability weeks that remain out of the statutory 415 maximum weeks payable for a permanent partial general disability. Additionally, if the Appeals Board finds claimant is not entitled to a modification of the March 11, 1997, Agreed Award, the claimant requests the Appeals Board to award claimant's attorney a reasonable attorney fee.

The liability of the Workers Compensation Fund (Fund) remained an issue before the Administrative Law Judge. The Administrative Law Judge denied any Fund liability. At oral argument before the Appeals Board, the respondent announced the Fund had been dismissed from the case. But both the respondent and the Fund requested the Appeals Board to include in its order that a compromise agreement was in the process of being reached between the respondent and the Fund concerning the payment of a portion of the Fund's attorney fees by respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Appeals Board makes the following findings and conclusions:

FINDINGS OF FACT

1. On October 9, 1991, claimant injured her back and both knees when she fell through the ceiling of a customer's house while checking a gas furnace in the customer's attic.
2. On the date of the accident, claimant had been employed by respondent since January 26, 1981. Her job classification was that of service person/appliance repair.
3. Respondent provided claimant with medical treatment for her injuries primarily with orthopedic surgeon Mary Ann Hoffman, M.D., of Lawrence, Kansas. Dr. Hoffman treated claimant conservatively with medication, physical therapy, and work hardening. The respondent returned claimant to work with restrictions on January 23, 1992. But at claimant's request, Dr. Hoffman, in February 1992, released claimant to return to her regular job without restrictions.
4. After Dr. Hoffman released claimant, in a letter dated August 24, 1994, at respondent's request, she rated claimant's permanent functional impairment and she again placed permanent restrictions on claimant's work activities. Dr. Hoffman found claimant's injuries had resulted in a 10 percent whole body permanent functional impairment. Dr. Hoffman returned claimant to her regular job but with permanent restrictions of no lifting over 50 pounds, no pushing or pulling appliances, and no carrying of materials weighing more than 50 pounds.
5. After claimant was returned to work and was attempting to perform her regular job, she was examined and evaluated by P. Brent Koprivica, M.D., at the request of her attorney. Dr. Koprivica examined claimant on April 26, 1993. He diagnosed claimant with chronic thoracic and lumbosacral sprain; aggravation of a twice operated right knee with chronic pain, chondromalacia patellae, as well as ligamentous laxity of the ACL, and

degenerative disease; and left knee symptoms related to chondromalacia. Dr. Koprivica attributed all of these conditions as being either permanently aggravated or caused by claimant's October 9, 1991, fall at work.

Dr. Koprivica, in accordance with the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), found claimant's chronic thoracic strain resulted in a three percent whole body functional impairment. He found claimant's lumbosacral sprain resulted in a 10 percent whole body functional impairment. In regard to claimant's right knee injury, he found a 25 percent lower extremity functional impairment which he converted to a 10 percent whole body functional impairment. The left knee was assessed with a 10 percent lower extremity functional impairment that converted to a four percent whole body functional impairment. Based on the Combined Value Chart of the Guides, the whole body impairments were combined for a 24 percent whole body functional impairment.

Dr. Koprivica placed permanent restrictions on claimant's activities of limited walking, stair and ladder climbing. Claimant was to avoid stooping and kneeling. The doctor acknowledged that claimant was exceeding those restrictions in performing her regular job duties of service person/appliance repair.

6. Claimant attempted but was not physically able to perform all the job duties required of her job as service person/appliance repair. Respondent notified claimant she was either going to have perform all of her regular job duties, transfer to a job she could perform, or she would have to quit.

7. At that time, a desk job of credit coordinator was available in the credit department. Claimant had previously worked in the credit coordinator job from 1981 through 1986. Claimant testified she bid off the credit coordinator job in 1986 because it was a miserable job. She disliked having to work on a daily basis with disgruntled customers. Nevertheless, because she did not want to give up a good paying job and with good benefits, she successfully bid and was transferred to the credit coordinator job.

8. But, according to claimant, the current credit coordinator job required her to do the job that two people were doing when she performed it from 1981 through 1986. As a result, claimant, in April of 1997, was unable to continue the credit coordinator job because of severe mental stress and anxiety. Claimant requested time off the job because she could no longer tolerate working with disgruntled and irate customers on a daily basis. The emotional stress of the job was particularly intense during the spring of the year when she was required to notify delinquent customers their gas service would be shut off.

9. Claimant testified that her severe emotional distress culminated in April of 1997 after the respondent had sent her for training that focused on the development of skills to

deal with customers on a nicer and kinder level. Claimant's last day worked was April 8, 1997, and she remained employed on accrued sick leave and vacation pay until she voluntarily quit her employment with the respondent on November 1, 1997.

10. Because of her severe emotional problem, respondent's employee assistance program referred claimant for therapy and counseling to Susan Hasselle, a psychiatric nurse. Ms. Hasselle first saw claimant on April 22, 1997. Ms. Hasselle found claimant with panic attacks and displaying symptoms of acute anxiety related to her credit coordinator job. Claimant was diagnosed with an anxiety disorder and to a lesser extent a depression disorder. Claimant was placed on an anti-depressant medication and continued with psychotherapy sessions with Ms. Hasselle through February 24, 1998.

Ms. Hasselle attributed all of claimant's emotional problems directly to her working with the irate and complaining customers while she was employed by the respondent and performing the credit coordinator job.

11. Claimant was unable to return to the credit coordinator job because of her emotional problems. Also, she could not perform the service person/appliance repair because of her physical injuries. Respondent did not offer claimant any other jobs within her physical restrictions.

12. Claimant claims she did not look for other employment between April 9, 1997, and January 1, 1998, because of her severe emotional problems. But Ms. Hasselle, claimant's therapist, testified claimant was only unable to work because of her emotional problems for the first two weeks after she first saw claimant on April 22, 1997.

13. Claimant did start to look for other employment on or about January 1, 1998. The first job that she found was with National Computer Systems. Claimant started that job on February 3, 1998. Her job duties would be classified sedentary as she sat at a desk and processed financial aid forms.

14. On the date of the regular hearing, November 23, 1999, claimant had been employed by Southwestern Bell Telephone Company since November 9, 1998, as a relay operator assisting hearing impaired customers with telephone calls. At that time, she was earning \$11.975 per hour. She testified she also received fringe benefits between 20 and 25 percent of the hourly rate. This also was a sedentary desk job that allowed claimant to stand and stretch as needed. Claimant testified she had no physical or emotional problems performing this particular job.

15. During the litigation of this review and modification proceeding, claimant testified at various time that she was unable to continue the credit coordinator job both because of her severe emotional problems and because of the low-back pain she suffered while she

was sitting and working the creditor coordinator job. Claimant claimed her low back bothered her because she was unable to stand and stretch except during her two 15-minute breaks and her one-hour lunch period. She also complained the stress of the job caused her to have continued low-back pain.

16. Claimant's attorney referred claimant for examination and evaluation to Robert E. Schulman, Ph.D. Dr. Schulman is a clinical psychologist. He saw claimant on March 16, 1999, on one occasion. After interviewing and testing the claimant, Dr. Schulman's impression was chronic adjustment disorder with mild depression and mild anxiety.

Dr. Schulman concluded the credit coordinator job was more than claimant was able to manage in terms of the emotional impact and negativism that went along with the job. It was Dr. Schulman's opinion that claimant was unable to return to the credit coordinator job because of her emotional problems as opposed to her physical problems.

17. Dr. Koprivica saw claimant again for examination and evaluation on April 29, 1999. He found claimant's physical injuries had worsened without any specific intervening accidents. Dr. Koprivica concluded that claimant's functional impairment of the lumbar spine had increased three percent due to an additional loss of range of motion. Claimant's right knee had worsen because of degenerative changes and additional loss of range of motion for an increase of 15 percent functional impairment of the right lower extremity. He also found a 10 percent functional impairment increase in claimant's left lower extremity due to additional loss of range of motion and degenerative changes.

Dr. Koprivica increased claimant's permanent restrictions from limited stair and ladder climbing to no ladder climbing and rarely stair climbing. Claimant's limited stooping and kneeling was increased to rarely stooping, crawling, and kneeling. He recommended that claimant work in a seated position that rarely required her to stand or walk. But the job should allow her to stand and stretch on occasion. Lifting was restricted to 20 pounds.

18. On January 13, 1998, respondent had claimant examined and evaluated by orthopedic surgeon Edward J. Prostic, M.D. Dr. Prostic did not testify, but the parties did stipulate his January 13, 1998, medical report into the record.

Dr. Prostic found claimant had sustained a soft tissue injury to her low back and had aggravated preexisting disease of both knees as a result of her October 9, 1991, work-related accident.

Dr. Prostic compared his examination findings with Dr. Koprivica's April 26, 1993, examination. The doctor found no objective worsening of claimant's low-back condition or her left knee condition. But he did conclude claimant's right knee had definitely worsened with obvious osteoarthritis. He judged claimant's right knee to have a 25

percent permanent impairment at the knee level, the same rating Dr. Koprivica had assessed in 1993. Dr. Prostic found appropriate work restrictions of no overhead work, no overhead work above shoulder level, no ladder climbing, no bending, no stooping, no pulling, no pushing, and no lifting over 10 pounds. Claimant should alternate sitting, standing, and lying down as needed.

19. Respondent had Chuck Hoag, claimant's supervisor, testify in this matter. Mr. Hoag was claimant's supervisor for a portion of 1995 and 1997 while she was working as a credit coordinator. He established through his testimony that claimant's credit coordinator job was a desk job but she had the opportunity to get up from the desk and stretch as needed. Additionally he testified that part of her job required her to leave the desk and walk 20 feet to a radio in order to contact outside service people about a shut off order.

Mr. Hoag testified claimant never had any physical complaints on the job during the time he supervised her. Furthermore, if claimant would have needed help to perform the credit job, there were back up employees available. But claimant never requested any help.

20. Claimant's attorney employed vocational expert Dick Santner to interview claimant and express an opinion on claimant's loss of ability to perform work in the open labor market and to earn comparable wages. Utilizing Dr. Hoffman's restrictions contained in a September 21, 1994, medical report, Mr. Santner found claimant had lost between 40 and 50 percent of her ability to perform work in the open labor market. In contrast, based on Dr. Koprivica's recent examination of claimant on April 29, 1999, and the restrictions placed on claimant at that time, Mr. Santner found claimant had lost 75 to 80 percent of her ability to perform work in the open labor market.

In regard to wage loss, Mr. Santner found claimant retained the ability to earn \$11.00 per hour working full time. Comparing \$440.00 per week with \$649.26 per week, claimant's average weekly wage without the cost of fringe benefits, Mr. Santner concluded claimant had a 32 percent wage loss.

CONCLUSIONS OF LAW

1. K.S.A. 44-528 permits modification of award in order to conform to changed conditions.¹ Review and modification is appropriate where there has been a change in the claimant's work disability.²

¹See Nance v. Harvey County, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

²See Garrison v. Beech Aircraft Corp., 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

2. In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.³

3. On claimant's date of accident, October 9, 1991, permanent partial general disability was measured by the loss of the employee's ability to perform work in open labor market and to earn comparable wages, except the percentage of permanent partial general disability shall not be less than the employee's functional impairment. Additionally, there was presumption against a work disability if the employee engaged in any work for comparable wages.⁴

4. The wage component of the work disability test is based on the actual wage loss only if the claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If claimant refused to even attempt such work, the wage of the accommodated job may be imputed to the claimant in work disability calculation.⁵

5. Here, after claimant's October 9, 1991, accidental injury, she returned to work for respondent at a comparable wage, and therefore the award that claimant entered into on March 11, 1997, was an award for permanent partial general disability based on claimant's functional impairment. But on April 8, 1997, claimant left her employment with the respondent because she could no longer perform the accommodated job of credit coordinator because of severe emotional problems caused by the job.

6. Respondent argues this case is analogous to the Foulk decision because claimant voluntarily left an accommodated position that she could perform within her restrictions that paid a comparable wage. Thus, respondent argues claimant is not entitled to a work disability because if she had not left this accommodated job voluntarily, she would have continued to earn a comparable wage.⁶

7. In contrast, claimant argues her emotional problems are directly related to her work-related physical injuries. The claimant contends her physical injury and resulting permanent restrictions were the reasons she was unable to satisfactorily perform her regular job of service person/appliance repair. Then as a direct result of those work-

³See Morris v. Kansas City Bd. of Public Util., 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

⁴See K.S.A. 1991 Supp. 44-510e(a).

⁵See Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

⁶Foulk, 20 Kan. 2d at 284.

related physical injuries, in order for her to maintain her employment status with the respondent, she attempted to perform the credit coordinator job that caused her severe emotional distress. As a result of the severe emotional distress, claimant was not able to continue to perform the credit coordinator job. Because respondent failed to offer claimant another accommodated job within her physical restrictions, claimant contends she is entitled to a modification of the Agreed Award to reflect a higher permanent partial general disability award based on her work disability.

8. The Appeals Board concludes claimant is entitled to a modification of the March 11, 1997, Agreed Award to reflect an increase in her permanent partial general disability because she is now entitled to a work disability. The Appeals Board concludes claimant did not act in bad faith when she could no longer perform the credit coordinator job because she did not possess the emotional ability to tolerate the irate and complaining customers.

9. The Appeals Board finds this case is more analogous to the Court of Appeals decision in Lee v. Boeing Co., 21 Kan. App. 2d 365, 899 P.2d 516 (1995), where the Court of Appeals affirmed the Appeals Board's finding that the claimant was entitled to a work disability after he was laid off from an accommodated job paying a comparable wage.

The Lee case was further discussed in the case of Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997), where the Court of Appeals held that placing an injured worker in an accommodated job artificially avoids a work disability by allowing the employee to retain the ability to perform work for a comparable wage. But once the accommodated position ends, the injured worker may be exposed to the open labor market and a work disability may be revealed. Therefore, once an accommodated job ends, the presumption of no work disability may be rebutted. 23 Kan. App. 2d at 839.

10. In this case, although claimant had previously performed the credit collection job and felt it was a miserable job, she again attempted to perform the job because it was within her physical restrictions. Also, claimant wanted to make every effort to retain her long-time employment with the respondent because she was earning good wages along with good fringe benefits. Unfortunately, her good faith effort to perform the credit coordinator job failed because she did not possess the emotional ability to listen and otherwise handle the irate and complaining customers.

11. Vocational expert Dick Santner was the only vocational expert that testified and expressed an opinion on claimant's loss of ability to perform work and earn comparable wages in the open labor market. The Appeals Board finds Mr. Santner's opinions are

reasonable and there is no showing that his opinions are untrustworthy.⁷ The Appeals Board, therefore, affirms the Administrative Law Judge's work disability award of 53.5 percent.

Mr. Santner computed this work disability percentage by averaging a 75 percent loss of ability to perform work in the open labor market with a 32 percent loss of ability to earn comparable wages. Mr. Santner testified that, based on Dr. Koprivica's more current restrictions imposed as of April 29, 1999, claimant had a 75 to 80 percent loss of ability to perform work in work in the open labor market. In regard to claimant's ability to earn comparable wages, Mr. Santner testified that, using claimant's stipulated average weekly wage, without fringe benefits, of \$649.26 and comparing that to his opinion that claimant had the ability to earn \$11.00 per hour post-injury, resulted in a 32 percent wage loss.

12. The Appeals Board finds the effective date of the modification of the March 11, 1997, Agreed Award reflecting the higher 53.5 percent work disability should be April 9, 1997, the day after claimant's last day worked on the credit coordinator job. The Appeals Board recognizes the record contains evidence that indicates, although claimant could not perform the credit coordinator job because of her severe emotional problems, she had the ability but failed to seek appropriate employment until January 1, 1998.

But the Appeals Board concludes, under the work disability test in effect on the date of claimant's original October 9, 1991, accident, the wage loss component was an ability test which then imputes a wage to the claimant whether she is or is not making a good faith effort to find appropriate employment. In this case, Mr. Santner's opinion that claimant had the ability to earn \$11.00 per hour was imputed to the claimant as of April 9, 1997.

13. The Administrative Law Judge denied claimant's request for temporary total disability compensation for the period from April 9, 1997, through January 1, 1998. The Administrative Law Judge denied the temporary total disability request because claimant only raised the issue for the first time in her submission letter and therefore did not give the respondent an opportunity to rebut the contention.

The Appeals Board also denies claimant's request for temporary total disability compensation. The Appeals Board, however, further finds the reason claimant was not working during this period was not because of her work related injuries but was because of her emotional inability to perform the credit coordinator job.

⁷ See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 380, 573 P.2d 1036 (1978).

14. The Appeals Board agrees with the respondent that it should be given credit for all amounts previously paid in the original March 11, 1997, Agreed Award.

15. The Appeals Board also finds, as requested by the respondent and the Fund, that respondent has dismissed the Fund from these proceedings. In respect to the Fund's attorney fee request, the Fund and the respondent, at oral argument, were in the process of negotiating a compromise agreement directing the respondent to pay the Fund a portion of the its attorney fee request.

16. All other findings and conclusions contained in the Award are adopted by the Appeals Board to the extent they are not inconsistent with this Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Administrative Law Judge Brad E. Avery's March 22, 2000, Award and the March 23, 2000, Award Nunc Pro Tunc should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Katharine L. Polzkill, and against the respondent, Kansas Public Service, and its insurance carrier, St. Paul Fire and Marine Insurance Company, for an accidental injury which occurred October 9, 1991, and based upon an average weekly wage of \$649.26 through October 31, 1991, and \$769.26 thereafter.

Claimant is entitled to 9 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$2,601.00, followed by 277.86 weeks of permanent partial disability compensation at the rate of \$83.67 per week or \$23,248.55 for a 19.33% permanent partial general disability. Commencing April 9, 1997, the effective date of the modification of the March 11, 1997, Agreed Award, claimant is entitled to 29.43 weeks of permanent partial disability compensation at the rate of 231.58 per week or \$6,815.40 for a 53.5% permanent partial general disability, followed by 98.71 weeks of permanent partial disability compensation at the rate of \$274.38⁸ per week or \$27,084.05 for a 53.5% permanent partial general disability, making a total award of \$59,749.00, which is all due and owing and is ordered paid in one lump, less all amounts previously paid.

The Appeals Board adopts all remaining orders contained in the Award.

⁸Effective November 1, 1997, claimant's average weekly wage increased to \$769.26 taking into consideration the loss of fringe benefits.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: John M. Ostrowski, Topeka, KS
Patricia Wohlford, Overland Park, KS
Derek J. Shafer, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director