

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

KATHY SIEH)	
Claimant)	
VS.)	
)	Docket No. 195,613
LORI'S HALLMARK)	
Respondent)	
AND)	
)	
STATE FARM FIRE & CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appeal from the Review and Modification of an Award dated October 31, 1997, entered by Administrative Law Judge Nelsonna Potts Barnes.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for the claimant. James A. Cline of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record and the parties' stipulations are set forth in both the original Award dated July 27, 1995, and the Review and Modification of an Award dated October 31, 1997.

ISSUES

In the original Award dated July 27, 1995, claimant was granted permanent partial general disability benefits for a 9 percent whole body functional impairment. After being terminated by respondent in August 1996, claimant initiated this review and modification proceeding. The Administrative Law Judge increased claimant's permanent partial general

disability to 70 percent. Respondent and its insurance carrier requested the Appeals Board to review the issues of (1) the nature and extent of claimant's disability and (2) whether claimant proved she is entitled to modification of the original award. 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) Claimant developed bilateral carpal tunnel syndrome while working for the respondent. The parties agreed to an award which was approved by the Administrative Law Judge on July 27, 1995, and which granted claimant permanent partial general disability benefits for a 9 percent whole body functional impairment. The parties agreed that the date of accident for purposes of computing the award was October 28, 1994, and that claimant's average weekly wage on the date of accident was \$247.71.

(2) Between December 15, 1994, and March 28, 1995, claimant received conservative medical treatment for the bilateral carpal tunnel condition from Wichita hand surgeon J. Mark Melhorn, M.D. When claimant declined surgery, Dr. Melhorn suggested claimant modify her work. The doctor testified as follows:

We suggested a regular work that would be modified by weight using OSHA guides of 50 pounds maximum and 25 frequent and would encourage task rotation in the work place.

Dr. Melhorn last saw claimant on March 28, 1995.

(3) Claimant also consulted board-certified physical medicine and rehabilitation physician Lawrence R. Blaty, M.D., for a medical evaluation. He diagnosed bilateral carpal tunnel syndrome and suggested that claimant observe the following permanent medical restrictions:

. . . no lifting or gripping activities of greater than 25 pounds occasionally or 10 pounds frequently, and . . . no repetitive gripping, squeezing, twisting or flexion type activities with her hands or wrists.

(4) Despite her upper extremity injuries, claimant continued to work for respondent as a floral worker until the last week in August 1996 when she was terminated and accused of stealing because she had given a customer \$15 worth of credit coupons to replace some which were allegedly lost. Claimant's testimony is uncontroverted that both she and her supervisor previously had replaced lost coupons for customers in a similar manner and that she thought she was following her supervisor's policy when she replaced the coupons in question.

(5) Following her termination, claimant applied for unemployment benefits which respondent did not contest. In conjunction with the application for unemployment benefits, claimant received paperwork which indicated respondent represented in that proceeding that claimant had voluntarily quit working for the respondent and that there was insufficient work for her to perform.

(6) Considering the entire record, the Appeals Board finds claimant's termination was not for cause.

(7) Based upon claimant's uncontroverted testimony, the Appeals Board finds claimant's job as a floral worker and designer which she performed after the October 1994 injury violated the medical restrictions which Dr. Blaty recommended.

(8) After reviewing the job task list which claimant identified as being a complete and accurate description of the tasks which she performed in the 15-year period immediately preceding the date of accident, Dr. Blaty testified that claimant should not perform 11 of 19, or 58 percent, of the tasks listed.

(9) Dr. Melhorn reviewed the same task list as did Dr. Blaty and testified that claimant should not perform "3 or possibly 4" of the 19 tasks which equates to a task loss of 16 to 21 percent.

(10) Claimant filed a request for review and modification on September 19, 1996. When she testified in December 1996, claimant was unemployed although she was actively seeking employment. Claimant has made a good faith effort to find appropriate employment.

CONCLUSIONS OF LAW

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

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Because this is a review and modification proceeding, K.S.A. 44-528 is applicable. It provides:

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 administrative law judge 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 administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. 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.

Because of her termination, claimant alleges her circumstances have changed and, thus, contends she is now entitled to a modification of the July 1995 award. The Appeals Board agrees.

The Appeals Board adopts the Administrative Law Judge's finding that claimant has a 40 percent task loss which approximates an average of the 58 percent loss provided by Dr. Blaty and the 16 to 21 percent loss provided by Dr. Melhorn.

The Appeals Board also adopts the Administrative Law Judge's finding that the difference in claimant's pre- and post-injury wage is 100 percent. As indicated above, despite a good faith effort to find appropriate employment, claimant is unemployed. See Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

As required by K.S.A. 44-510e, the Appeals Board averages the 40 percent task loss with the 100 percent wage loss and finds claimant has a 70 percent permanent partial general disability effective September 1, 1996.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review and Modification of an Award dated October 31, 1997, should be, and hereby is, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Kathy Sieh, and against the respondent, Lori's Hallmark, and its insurance carrier, State Farm Fire & Casualty Company, for an accidental injury which occurred October 28, 1994, and based upon an average weekly wage of \$247.71 for 37.35 weeks at the rate of \$165.15 per week or \$6,168.35, for a 9% permanent partial general disability for the period October 28, 1994, through August 31, 1996; beginning September 1, 1996, claimant is entitled to 253.15 weeks at the rate of \$165.15 per week or \$41,807.72, for a 70% permanent partial general disability, making a total award of \$47,976.07.

As of February 28, 1998, there is due and owing claimant 37.35 weeks of permanent partial general disability compensation at the rate of \$165.15 per week or \$6,168.35, all of which is due and payable; followed by 136.79 weeks of permanent partial general disability compensation at the rate of \$165.15 per week in the sum of \$22,590.87 for a total of \$28,759.22, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$19,216.85 is to be paid for 116.36 weeks at the rate of \$165.15 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts the remaining orders set forth in the award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Joseph Seiwert, Wichita, KS
- James A. Cline, Wichita, KS
- Nelsonna Potts Barnes, Administrative Law Judge
- Philip S. Harness, Director