

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

GRAY PRESCOTT)	
Claimant)	
VS.)	
)	Docket No. 230,434
STATE OF KANSAS)	
Respondent)	
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Carrier)	

ORDER

Respondent appealed the April 12, 1999 Order entered by Administrative Law Judge Bryce D. Benedict.

APPEARANCES

Frederick J. Patton II, of Topeka, Kansas, appeared for the claimant. Robert E. North of Topeka, Kansas, appeared for the respondent.

RECORD

The record consists of the transcript of the settlement hearing held before Special Administrative Law Judge Robert M. Telthorst on December 22, 1998, and the transcript of the motion hearing held on March 31, 1999.

ISSUES

Claimant injured his left hand on December 17, 1997. On December 22, 1998, the parties held a settlement hearing in which they agreed that claimant would be paid the total sum of \$5,919.06 in permanent partial disability benefits for an approximate 15% functional impairment to the upper extremity.

After allegedly discovering that it had made a clerical error in computing the amount of permanent partial disability benefits, respondent filed a motion to either set aside the settlement or conform it to represent what respondent contends to be the parties' actual

agreement. Judge Benedict conducted a hearing and, by Order dated April 12, 1999, denied respondent's request. That Order is the subject of this appeal.

Respondent contends Judge Benedict erred. It argues that the parties agreed to settle the permanent partial disability portion of this claim based upon a 15 percent functional impairment to the arm for the sum of \$5,069.13, instead of the dollar amount both recited during the settlement hearing and shown in the settlement worksheet presented at that hearing. Respondent contends that the settlement should be either set aside or modified based upon either an alleged clerical error or a mutual mistake.

Conversely, claimant rejects respondent's notion of mutual mistake but argues the \$5,919.06 settlement amount agreed to by the parties at the settlement hearing is a stipulation and, therefore, it binds the parties. Further, claimant argues that the settlement hearing award became final as respondent failed to file a timely appeal.

The issues before the Appeals Board on this appeal are:

1. Does the Board have the authority to set aside or modify the settlement approved by the Judge at the December 22, 1998 hearing?
2. If so, has the respondent established that the settlement should be either set aside or modified?
3. Did the settlement hearing award become final because respondent failed to file a timely appeal?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. On December 17, 1997, Mr. Prescott injured his left hand when it was crushed in an elevator door. The accident caused multiple fractures to the left second, third, and fourth metacarpals. The accident occurred while Mr. Prescott was working for the State of Kansas.
2. On December 22, 1998, the parties held a settlement hearing before Judge Telthorst. At that hearing the State's attorney recited the terms of settlement:

(By Mr. Gates) ...Your Honor, we would just like to place on the record that [this] is a 15 percent impairment to the right [sic] upper extremity, specifically the hand. All issues including future medical and review and modification are left open. The total payout for the award is \$5,919.06. The amount to be paid today is \$5,069.13. And it will be 4.47 weeks remaining which will be

paid on a bi-weekly basis. In other words, you'll get for another 4.47 weeks you'll get a check every other week.

(By Mr. Patton) Until [\$]849.93 additional funds will be paid.

(By Mr. Prescott) Oh, okay.

3. At the settlement hearing, the State presented Judge Telthorst with a settlement worksheet that it had prepared. That worksheet contained the following:

...

Basis of Settlement: Approximate 15% impairment to the right [sic] upper extremity (hand)

This is an agreed upon Running Award as though this matter was fully tried and claimant was held to have a 15% impairment to the right [sic] upper extremity on D/A 12/17/97, with all future rights under the Kansas Workers' Compensation Act remaining available to the claimant and the respondent, including the right to future medical treatment, which is reasonably necessary to cure and relieve claimant from the effects of this subject work-related injury, upon proper application to the director with medical management provided by respondent.

This Running Award is based on a 15% permanent partial impairment to the right [sic] upper extremity. The Court accepts the stipulations of the parties and makes findings consistent with the stipulations. Accordingly, in addition to the 22.30 weeks of TTD already paid, **the claimant is entitled to 31.13 weeks of permanent partial disability at the weekly rate of \$190.14 for a total of \$5,919.06.** As of December 26, 1998, 26.66 weeks are due and owing which equals \$5,069.13 to be presented at settlement. **The remaining 4.47 weeks in the amount of \$849.93 will be paid bi-weekly** in accordance with the State's payroll practices. (Emphasis added.)

...

Judge Telthorst approved the settlement terms.

4. Attached to the settlement worksheet is a medical report from Dr. Peter V. Bieri dated September 23, 1998. It states that Mr. Prescott has an 18 percent functional impairment to the left upper extremity according to the fourth edition of the AMA Guides to the Evaluation of Permanent Impairment. Also attached to the settlement worksheet is an office note dated September 24, 1998, from Dr. Richard E. Polly. But that note does

not provide an impairment rating as it indicates the doctor wanted to rate Mr. Prescott six months later after another examination and additional tests.

5. On March 11, 1999, the State filed its motion requesting the Division of Workers Compensation to either set aside the December 22, 1998 settlement award or modify it to reduce the amount awarded for functional impairment to \$5,069.13.

6. There is neither evidence nor allegation that the settlement award was obtained by fraud, undue influence, serious misconduct, or that it was made without authority. Further, there is no evidence that Mr. Prescott's functional impairment or other circumstances have changed.

CONCLUSIONS OF LAW

1. All awards, except those lump-sum settlements approved by the Director or an administrative law judge, may be reviewed upon good cause shown. Upon that review, the award may be modified if (1) it was obtained by fraud or undue influence, (2) it was made without authority or as the result of serious misconduct, (3) it was excessive or inadequate, or (4) the worker's functional impairment or work disability has changed.¹

2. The award entered at the December 22, 1998 settlement hearing was not a "lump-sum settlement" as it did not settle or extinguish all of Mr. Prescott's rights under the Workers Compensation Act. The award specifically provided that Mr. Prescott's right to additional medical was being reserved along with both parties' right to seek review and modification of the award. The parties agreed that the settlement award would have the same force and effect as an award entered by a judge in a litigated proceeding.

3. Because the settlement award was not a lump-sum settlement, the Board concludes that the award may be reviewed as provided by K.S.A. 44-528. Therefore, Mr. Prescott's argument that the State failed to timely appeal the settlement award is without merit.

4. As indicated above, there is no evidence that the settlement award was obtained by fraud or undue influence. Further, there is no evidence that the award was made without authority or as the result of serious misconduct, or that Mr. Prescott's functional impairment has changed. The State alleges that the amount awarded does not conform to the initial agreement struck by the parties during negotiations held before the settlement hearing. Therefore, the State contends the settlement award was excessive and the product of a mutual mistake.

5. Based upon the recitation of the settlement terms at the settlement hearing, the Board finds that the parties specifically agreed to settle the claim for permanent partial

¹ K.S.A. 44-528(a).

disability benefits for the sum of \$5,919.06 and that Judge Telthorst approved it. How the parties arrived at that amount is irrelevant. The Board concludes that there was no mutual mistake as to the terms of the Award. The Board is aware that oftentimes factors other than the functional impairment rating are important in determining a fair settlement amount. Absent the wrongful conduct listed in K.S.A. 44-528 and mentioned above and absent a change in circumstances, both parties must live with the permanent partial disability award that was entered at the settlement hearing. Because both parties specifically agreed to the \$5,919.06 sum, the Board concludes that an award in that amount was not excessive.

6. The Board agrees with Judge Benedict that the State's request to set aside or modify the December 22, 1998 Award must be denied.

WHEREFORE, the Appeals Board affirms the April 12, 1999 Order entered by Judge Bryce D. Benedict.

IT IS SO ORDERED.

Dated this ____ day of July 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Frederick J. Patton II, Topeka, KS
- Robert E. North, Topeka, KS
- Bryce D. Benedict, Administrative Law Judge
- Philip S. Harness, Director