

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

KENT W. KRAUS, deceased)	
Claimant)	
VS)	
)	Docket No. 239,731
THE BOEING COMPANY)	
Respondent)	
)	
AND)	
)	
INSURANCE CO. STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appeal from an Award dated March 20, 2002, entered by Administrative Law Judge (ALJ) Jon L. Frobish. The parties presented oral arguments before the Appeals Board (Board) on October 18, 2002.

APPEARANCES

Garry L. Howard of Wichita, Kansas, appeared for claimant. Eric K. Kuhn of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Award, together with the pleadings and exhibits contained in the administrative file.

ISSUES

Does a worker's death from independent and unrelated causes terminate the respondent's obligation to pay weekly disability benefits for the period preceding the worker's death which are awarded in review and modification proceedings that were commenced before but concluded after the worker's death?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Kent Kraus sustained a compensable work injury on February 10, 1998. The parties entered into an agreed upon Award that was approved and filed by the ALJ on April 27, 1999. That Award entitled Mr. Kraus to seven weeks of temporary total and 103.75 weeks of permanent partial general disability compensation for a 25% functional impairment. Those disability benefits paid out on March 29, 2000.

Respondent accommodated Mr. Kraus's restrictions for more than two years. However, respondent laid Mr. Kraus off as part of a general workforce reduction on February 17, 2000. Mr. Kraus filed his application for review and modification on December 1, 2000. He died on May 17, 2001 while the review and modification proceeding was pending.

Based on the lay-off and application for review and modification, the ALJ held that Mr. Kraus was entitled to increased compensation based on a work disability. The ALJ awarded Mr. Kraus's widow the work disability benefits that would have been due and owing on the date of Mr. Kraus's death, but held all benefits should cease as of the date of his death. The ALJ reasoned that he was able to fashion a remedy because the application for review and modification had been filed and all facts necessary to determine Mr. Kraus's right to increased compensation existed at the time of his death.

On appeal, respondent does not dispute the nature and extent of Mr. Kraus's work disability award.¹ But, respondent presents a two-pronged argument regarding Mr. Kraus's widow's entitlement to those benefits under K.S.A. 44-510e(b). First, respondent argues that the ALJ erred in awarding Mr. Kraus's widow workers compensation benefits under K.S.A. 44-510e(b) because compensation was not due on the date of Mr. Kraus's death. Secondly, respondent argues that Mr. Kraus's widow is not entitled to compensation because respondent was not paying compensation when Mr. Kraus died. Claimant, on the other hand, argues that the ALJ's decision is legally sound and requests the Board to affirm the ALJ's decision.

¹ Respondent's Brief at 2.

Respondent relies on the plain language of K.S.A. 44-510e(b) and the Court of Appeals' holding in *Barncord v. Kansas Dept. of Transportation*, 4 Kan. App. 2d 368, 606 P.2d 501 (1980), *aff'd*, 228 Kan. 289, 613 P.2d 670 (1980), to support its position. K.S.A. 44-510e(b) provides:

If a workman has received an injury for which compensation *is being paid*, and the employee's death is caused by other and independent causes, any payment of compensation **already due** the employee at the time of his death and then unpaid shall be paid to the employee's dependents directly or to the employee's legal representatives if the employee left no dependent, but the liability of the employer for the payments of compensation *not yet due* at the time of the death of such employee shall cease and be abrogated by employee's death. (emphasis added).

In *Barncord*, the Workers Compensation Fund (Fund) argued that a worker's heirs were not entitled to compensation under K.S.A. 44-510e(b). According to the Fund, in order for a worker's heirs to be entitled to compensation under this statute, compensation had to be due and owing on the date of the worker's death. Since the parties had not yet submitted an oral settlement agreement for approval pursuant to K.S.A. 44-527 and K.A.R. 51-3-1, the Fund argued that the compensation encompassed in the settlement agreement was not yet due and owing. The Court of Appeals agreed.

According to the Court of Appeals, K.A.R. 51-3-1 set out the exclusive methods by which compensation could be paid under the Kansas Workers Compensation Act. While that regulation allowed for payment of compensation pursuant to a settlement agreement, it also required the parties to file the agreement along with a final receipt and release of liability with the Director. Since the parties had not done so, the workers compensation claim had not been disposed of in a manner recognized by the regulation. Thus, the court held that "the settlement amount was not due claimant as of the date of his death," and "it thus became abrogated by virtue of K.S.A. 1979 Supp. 44-510e(b)." ²

In the present case, respondent requests the Board to extend *Barncord's* reasoning to a materially different set of facts. The Board declines to do so.

First, the Board is persuaded that the *Barncord* case is not controlling since *Barncord's* heirs sought payment of permanent partial disability compensation due after the worker's death. Contrary to the respondent in this case, the Fund did not dispute the heirs' entitlement to compensation for the weeks preceding the death. Instead, the Fund tendered the compensation due and owing the deceased worker when he died.³ Thus,

² *Barncord*, 4 Kan. App. 2d at 374.

³ *Barncord*, 4 Kan. App. 2d at 369.

in *Barncord*, the Fund conceded that compensation was due the deceased worker, and therefore his heirs, for purposes of K.S.A. 44-510e(b).

In *Thomas v. General Motors*,⁴ the Board rejected a similar argument where the worker died before an original Award was entered. Due to the worker's untimely death, the employer argued that the claim should be dismissed. The employer further argued that the principles set forth in *Barncord* required a finding that compensation was not due the claimant under K.S.A. 55-510e(b) because the ALJ had not determined the case and entered an award or otherwise terminated the case as mandated by regulation.

The Board rejected the employer's argument and found *Barncord* was not controlling because:

The *Barncord* decision was based upon a materially different set of facts. In that case the Court of Appeals was asked to determine whether a verbal settlement agreement was enforceable after the claimant's death. It does not appear from that case that the evidence was presented and awaiting a decision by the Administrative Law Judge. Certainly it does not appear that an award was ever entered in that case. The Court of Appeals found the settlement agreement not to be enforceable. In this case the claim had been litigated and an award entered. We find that the benefits were due as of the date of claimant's death.

The Board noted that while a respondent has the right to defend a workers compensation claim, the same respondent is also obligated to pay benefits on a timely basis when the claim is legitimate. The Board also noted that a subsequent award in a defended claim represents a finding that the claim was and is legitimate and that the benefits were previously due and owing the worker on a weekly basis. Accordingly, the Board found the benefits were due Thomas on the date of his death.

The Board sees no reason why it should depart from the rationale employed in *Thomas* simply because this case involves a review and modification proceeding. In fact, claimant's case is strengthened since the ALJ had determined the issue of compensability before Mr. Kraus's death. The only issue open for decision on the day Mr. Kraus died was the extent of his work disability, an issue respondent does not dispute. Consequently, the Board extends the rationale employed in *Thomas* to include cases involving review and modification proceedings.

Moreover, since the time that the Board decided *Thomas* in 1995, the Kansas Supreme Court rendered its decision in *Ruddick v. Boeing Co.*, 263 Kan. 494, 498, 949

⁴ *Thomas v. General Motors*, Nos. 104,746 & 114,219, 1995 WL 781186 (Kan. WCAB Dec. 15, 1995).

P.2d 1132 (1997). The Board finds that *Ruddick* likewise mandates a finding that weekly work disability benefits became due Kraus as of the date respondent laid him off work and he filed his claim for review and modification.

Like the instant case, *Ruddick* involved a review and modification proceeding. In *Ruddick*, the respondent Boeing sought review and modification of an award because it had recalled the claimant to employment. Because the claimant was now earning a wage comparable to his pre-injury wage, Boeing argued that it had no further liability for work disability benefits based upon K.S.A. 44-510e(a).⁵ *Ruddick* contended that respondent was required to continue paying the weekly permanent partial disability compensation benefits until they were fully paid or the award was modified by the ALJ. A regulation then in effect supported *Ruddick*'s contention.

Despite the regulation, the Kansas Supreme Court agreed with Boeing. The court found that K.A.R. 51-19-1 was void because it violated the spirit and the letter of the law behind K.S.A. 44-528 which mandated that a modification be effective on the date that the increase or decrease in disability "actually occurred." According to the court, "K.S.A. 44-528(d) 'clearly provides' that the modification of *Ruddick*'s award made on the basis that his work disability increased or diminished became effective . . . the date that *Ruddick* returned to work" ⁶

The Board notes that Boeing's position in *Ruddick* runs contrary to Boeing's argument herein. Whereas in *Ruddick*, Boeing argued that the retroactivity provision of the review and modification statute entitled Boeing to terminate the employee's work disability payments on the date the employee was returned to work even when an order was in place providing for the payment of same, here, Boeing is arguing that the employee's work disability payments should not be deemed due or effective on the date the employee was laid off. Following the Supreme Court's holding in *Ruddick*, the Board finds that when respondent laid Mr. Kraus off and he filed his application for review and modification, his weekly work disability payments became due as each week passed after the layoff [subject to the six month retroactivity provision in K.S.A. 44-528(d)], regardless of whether the ALJ had decided his review and modification claim.⁷ As a result, the Board finds that respondent's first argument fails.

⁵ Under the statute, an employee is not entitled to receive permanent partial general disability in excess of the percentage of his or her 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.

⁶ *Ruddick*, 263 Kan. at 500.

⁷ See also *Lawrence v. Natural Gas Pipe Line Co.*, 152 Kan. 558, 406 P.2d 685 (1940) (compensation already due the workman at the time of his death should be paid to his dependents).

Respondent next argues that Mr. Kraus's widow is not entitled to compensation because it was not paying Mr. Kraus compensation when he died. Respondent requests the Board to deny compensation based on the following language in K.S.A. 44-510e(b): "injury for which compensation is being paid" The respondent presented the same argument in *Thomas*. The Board found the argument unpersuasive because it did not comply with the intent of the Workers Compensation Act.

While the Board is mindful of the plain language of K.S.A. 44-510e(b), legislative intent must be determined from a general consideration of the entire Workers Compensation Act.⁸ The cardinal rule in interpreting statutes is to favor an interpretation that will fulfill the purpose of the statute over an interpretation that defeats the manifest objective of the Act.⁹ The legislature's intent is determined from the language of the statute in relation to its history and the objective to be accomplished.

In 1993, the Kansas Legislature significantly amended the Kansas Workers Compensation Act. One of the major revisions involved the formula for calculating and paying an injured employee's permanent partial general disability entitlement.¹⁰ Instead of multiplying the employee's average weekly wage by the percentage of disability and paying that resulting amount of benefits each week over 415 weeks, the Legislature instructed employers to multiply the 415 weeks by the percentage of disability. Employers then pay injured employees permanent partial general disability benefits for that resulting number of weeks at 66 2/3% of the employee's average weekly wage.¹¹ Under the old law, an injured employee received less every week, but for a longer period of time, the full 415 weeks. Under the new law, the injured employee receives an accelerated payout of permanent partial general disability benefits at a higher rate but for a much shorter number of weeks. Still, permanent partial disability compensation shall not "exceed 415 weeks following the date of such injury."¹²

⁸ *KPERS v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635 643-44, 941 P.2d 1321 (1997)(court must give effect to the legislature's intent even though words, phrases, or clauses at some place in the statute must be omitted or inserted).

⁹ K.S.A. 77-201, as amended by L. 2002, ch. 144, § 79; *State, ex rel., v. Kalb*, 218 Kan. 459, 543 P.2d 872 (1975), *modified on other grounds*, 219 Kan. 231, 546 P.2d 1406 (1976) (the entire act should be read according to its spirit and reason, disregarding so far as may be necessary the strict letter of the law).

¹⁰ K.S.A. 44-510e, as amended by L. 1993, ch. 286, § 34; *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 808, 975 P.2d 807 (1998).

¹¹ Subject to the statutory weekly maximum rate under K.S.A. 44-510c.

¹² K.S.A. 44-510e(a)(3).

Despite the 1993 amendments mandating accelerated payouts, the Kansas Legislature failed to amend K.S.A. 44-510e(b) accordingly. Nevertheless, the Board must interpret the statute in light of its history and the overall intent behind the Kansas Workers Compensation Act. The manifest intent of the Kansas Legislature as expressed throughout the Act is to compensate employees and their dependents for loss of income earning ability due to work-related injuries, disabilities, or death.¹³ In light of the 1993 amendments, the Board finds the legislature's failure to modify K.S.A. 44-510e(b) was merely an oversight or scrivener's error and could not be reflective of legislative intent. Thus, the Board finds that a reading of the entire Act in light of its history reveals that the Kansas Legislature intended K.S.A. 44-510e(b) to continue providing compensation that was due and owing an injured worker on the date of his or her death to his rightful heirs regardless of whether respondent was paying benefits on the date of death, up to a maximum of 415 weeks from the date of accident.

Accordingly, the Board affirms the ALJ's Award to the extent the ALJ awarded permanent partial general disability benefits due and owing Mr. Kraus when he died. However, the Board modifies the Award to provide only for payment of benefits between June 1, 2000 and May 17, 2001.¹⁴

Award

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated March 20, 2002, is modified to award claimant 7 weeks of temporary total disability compensation at the rate of \$335.75 per week in the amount of \$2,350.25, followed by 103.75 weeks of permanent partial general disability compensation at the rate of \$335.75 per week in the amount of \$34,834.06, plus 50.14 weeks of permanent partial general disability at the rate of \$335.75 per week in the amount of \$16,834.51 for a 71% work disability, which represents the amount due and owing on the date and time of Mr. Kraus's death, for a total award of \$54,018.82 less amounts previously pa

id.

IT IS SO ORDERED.

¹³ *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 852, 847, 942 P.2d 591 (1997).

¹⁴ K.S.A. 44-528 ("in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification")

Dated this _____ November 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

We agree with the majority's finding that the ALJ's review and modification Award dated March 20, 2002, should be affirmed to the extent the increased permanent partial general disability benefits were due and owing claimant at the time of his death. But we disagree with the majority awarding claimant 50.14 weeks of increased permanent partial general disability benefits commencing June 1, 2000. We would find claimant is only entitled to 35.28 weeks of the increased permanent partial disability instead of the 50.14 weeks found by the majority.

The ALJ's review and modification Award found, after claimant was laid-off as part of a general work force reduction, on February 17, 2000, he was entitled to a 71 percent work disability. Claimant's actual disability change, therefore, occurred as of the day after the lay-off or February 18, 2000. But claimant did not file an application for review and modification until December 1, 2000.

The effective date of any modification of an award shall not be more than six (6) months before the review and modification application is filed.¹⁵ Here, the effective date of the review and modification was June 1, 2000, and not February 18, 2000, the actual date of the increase in claimant's disability.

¹⁵ K.S.A. 44-528(d).

The claimant is not entitled to the increased work disability weeks between the actual date of the increase, February 18, 2000, and the effective date of the review and modification Award of June 1, 2000, which is 14.86 weeks. The reason claimant is not entitled to the 14.86 weeks of increased disability is because he failed to file a timely application for review and modification. Thus, claimant loses the 14.86 weeks between the actual date of the increased disability, February 18, 2000, and the effective date of the review and modification Award of June 1, 2000.

We have also previously addressed this review and modification issue in more detail in the Dissent in the case of *Ponder-Coppage v. State of Kansas*, No. 210,809 (Kan. WCAB Jan. 2002). We find no reason to repeat those findings and conclusions in this Order. We, therefore, adopt those findings and conclusions as if specifically set forth herein.

BOARD MEMBER

BOARD MEMBER

c: Garry L. Howard, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation