

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

DELORES R. ROMERO)	
Claimant)	
)	
VS.)	
)	
LEARJET, INC.)	
Respondent)	Docket No. 269,814
)	
AND)	
)	
ACE-USA)	
Insurance Carrier)	

ORDER

Claimant requests review of the July 22, 2004, Order entered by Special Administrative Law Judge (SALJ) Vincent L. Bogart. The Appeals Board (Board) heard oral argument on December 21, 2004.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. Matthew J. Schaefer of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record consists of the transcript of the August 30, 2001 settlement hearing together with the pleadings and other documents filed in the Division of Workers Compensation's administrative file. In addition, the record contains a Stipulation of Facts filed June 29, 2004. Although the record contains a notice of hearing for April 27, 2004, no transcript exists for a hearing on claimant's Motion to Set Aside Settlement nor for claimant's Application for Review and Modification. There is no indication whether a record was or was not requested.

ISSUES

This is an appeal from the SALJ's denial of claimant's post-award Application for Review and Modification and Motion to Set Aside Settlement. This claim was settled before another SALJ on August 30, 2001. Claimant appeared at that settlement hearing pro se. The settlement was based upon the functional impairment rating given by Dr. Mark Melhorn and was intended to be a full and final settlement of all issues and a redemption of the award except for future medical which was specifically left open. Claimant seeks to modify or set aside that settlement.

Claimant seeks to have the settlement set aside and her entitlement to additional compensation reconsidered because she lost her accommodated job with respondent and now alleges she is entitled to work disability. Claimant was laid off by respondent on August 10, 2002. She filed a motion to set aside the settlement or review and modify the award on March 26, 2004. In support of her petition for relief from the settlement, claimant relies on the review and modification statute, K.S.A. 44-528, the "final receipt" statute, K.S.A. 44-527, and the statute governing lump sum payment of awards, K.S.A. 44-531.

Respondent counters that K.S.A. 44-531 only requires that settlements not be approved for nine (9) months after an employee has returned to work and maintains that in this case the settlement took place more than nine (9) months after that occurred. Furthermore, respondent argues that claimant returned to her regular job and not an accommodated job and, therefore, K.S.A. 44-531 is not applicable. The date of accident was alleged as a series beginning September 13, 2000. The Board notes, however, that an ending date was neither alleged nor established.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant suffered a work-related injury to her upper extremities by a series of accidents beginning on or about September 13, 2000. She was treated by Dr. Mark Melhorn, who performed surgery on each of claimant's upper extremities, performing a right carpal tunnel release on January 23, 2001, and a left carpal tunnel release on April 3, 2001. Thereafter, he rated claimant with a 8.2 percent whole person impairment. Claimant returned to work the day following each surgery with temporary restrictions and then was released by Dr. Melhorn to regular work but with task rotation on May 30, 2001.

On August 30, 2001, respondent and claimant entered into a settlement agreement wherein respondent offered to pay a lump sum of \$13,320.36, based on a whole person impairment of 8.2 percent and a permanent partial disability rate of \$391.42 (calculated

from an average weekly wage of \$587.11). Claimant was not represented by counsel at the time of the settlement hearing.

Claimant was laid off from respondent on August 10, 2002. On March 25, 2004, she filed a motion to set aside the settlement award or to review and modify the award. On July 22, 2004, the SALJ denied her motion to set aside or to proceed with review and modification of the award entered in her case.

Claimant's motion poses the question, what force and effect is to be given the settlement award, i.e., is it void or voidable? In *Acosta*¹ the Kansas Supreme Court held that on an application for review and modification pursuant to K.S.A.44-528(a) neither the Board nor the ALJ had the jurisdiction to vacate an award ab initio.

The Workers Compensation Act provides an explicit procedure which allows an ALJ, on a motion for review and modification, to modify an award for fraud by increasing or diminishing the compensation. K.S.A. 44-528(a). Nothing in the statute allows an ALJ to declare the award void ab initio, and according to the general rule regarding review and modification, the modification operates only prospectively. See *Ferrell*, 223 Kan. At 423. Where there is a complete and legislated procedure, there is no room for the ALJ to invoke the "inherent power" of the tribunal to declare an award void ab initio for fraud.²

However, as claimant's settlement was a lump sum settlement, it is not subject to review and modification.³ Furthermore, claimant is not alleging fraud. In the alternative to review and modification, claimant seeks to have the settlement set aside as exceeding the SALJ's jurisdiction.

"[T]he ALJ and the Board are both administrative bodies. 'Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes. There is no general or common law power that can be exercised by an administrative agency.'(Citation omitted) Further, the Workers Compensation Act is substantial, complete and exclusive, covering every phase of the right to compensation and of the procedure for obtaining it."(Citation omitted)⁴

¹*Acosta v. National Beef Packing Co.*, 273 Kan. 385, 44 P.3d 330 (2002).

² *Id.* at 396 and 397.

³ *Peterson v. Garvey Elevators Inc.*, 252 Kan. 976, 850 P.2d 893 (1993); *Redgate v. City of Wichita*, 17 Kan. App. 2d. 253, 836 P.2d 1205 (1992).

⁴*Acosta* at 396.

Although the Kansas appellate courts have frequently reiterated the above principles, these principles have likewise been frequently ignored or exceptions created.⁵ For example, there is the line of cases which hold that portions of the Chapter 60 Code of Civil Procedure apply to workers compensation proceedings. There is also a line of cases grafting certain common law equitable remedies on to the Workers Compensation Act.⁶

K.S.A. 44-531(a) provides:

Where all parties agree to the payment of all or any part of compensation due under the workers compensation act or under any award or judgment, and where it has been determined at a hearing before the administrative law judge that it is for the best interest of the injured employee. . . the administrative law judge may permit the employer to redeem all or any part of the employer's liability under the workers compensation act by the payment of compensation in a lump sum, **except that no agreement for payment of compensation in a lump sum shall be approved for nine months after an employee has returned to work in cases in which the employee, who would otherwise be entitled to compensation for work disability, is not entitled to work disability compensation because of being returned to work at a comparable wage by the employer who employed the worker at the time of the injury giving rise to the claim being settled.** (Emphasis added.)

In order to determine whether the above statute was violated by the August 30, 2001 award, because the agreement for payment of compensation in a lump sum was approved less than nine (9) months from the date claimant returned to work following her accident, it must first be determined if claimant "would otherwise be entitled to compensation for work disability."

The record in this case is inadequate to state conclusively whether or not claimant was placed in an accommodated job by respondent and, if not, whether she continued to aggravate her repetitive trauma condition. Claimant missed work on January 23, 2001, and April 3, 2001, for surgeries. However, it appears both times she was released to return to some type of work the following day. Claimant was released to return to regular work but with task rotation on May 30, 2001, by Dr. Melhorn. This suggest that she had been given more restrictive temporary work restrictions previously. However, claimant testified that she returned to doing the same work despite informing her supervisor of her

⁵See e.g., *Bain v. Cormack Enterprises, Inc.*, 267 Kan. 754, 986 P.2d 373 (1999); *Nguyen v. IBP, Inc.*, 266 Kan. 580, 972 P.2d 747 (1999); *McIntyre v. A.L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996); *Dinkel v. Graves Truck Line, Inc.*, 10 Kan. App. 2d 604, 706 P.2d 470 (1985).

⁶See e.g., *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421 (2000); *Scott v. Wolf Creek Nuclear Operating Corp.*, 23 Kan. App. 2d 156, 928 P.2d 109 (1996). See also, *Coffman v. State*, 31 Kan. App. 2d 61, 59 P.3d 1050 (2002) (Where the Board applied judicial estoppel which the Court of Appeals mistook for equitable estoppel).

restrictions. She further indicated that she had difficulty performing that work. In the absence of returning to accommodated work, or otherwise proving permanent work restrictions, there is no basis for establishing that claimant would have been entitled to a work disability had she not returned to work for respondent. In the absence of being otherwise entitled to a work disability, the Board cannot find that the settlement violated K.S.A. 44-531(a). Conversely, the August 30, 2001 settlement hearing would have been premature if claimant's work restrictions would not have permitted her to return to her same unaccommodated job with respondent.⁷ Although K.S.A. 44-531(a) requires claimant to have been returned to work by respondent for at least nine months after the date of accident before a lump sum settlement can be approved, the Board cannot say that the SALJ exceeded his jurisdiction in approving the settlement based on this record.

The SALJ, in approving a settlement, must consider the best interests of the claimant.⁸ In this case the SALJ would have erred and may have been without authority to approve the settlement if claimant had been returned to work with respondent with permanent restrictions that would have precluded her from performing her regular job or if claimant was otherwise unable to perform her regular job duties due to her work-related injuries. As stated, to determine whether either scenario existed in this case calls for speculation. Dr. Melhorn returned claimant to return to her regular work on May 30, 2001, but with "task rotation." The record does not establish whether claimant's job included task rotation or if an accommodation would have been necessary to comply with Dr. Melhorn's restriction. Claimant testified that she was not accommodated, that she had difficulty performing her job and that she complained to her supervisor. Nevertheless, the record does not indicate that claimant sought additional medical treatment nor that she attempted to obtain additional work restrictions. It appears she continued to perform her regular job duties, but with complaints to her supervisor, until she was laid off for economic reasons on August 10, 2002.

It may be that regardless of whether or not the Board were to make a finding of fact that claimant met the definition of an employee "who would otherwise be entitled to compensation for work disability [but] is not entitled to work disability compensation because of being returned to work at a comparable wage by the employer who employed the worker at the time of the injury giving rise to the claim being settled,"⁹ that claimant is now without a remedy because claimant did not appeal the settlement award within ten (10) days as required by K.S.A. 44-551(b)(1). There is a question whether the Board has the power to set aside or void the settlement award. The Kansas Supreme Court in *Acosta* said that the Board does not have the authority upon a review and modification proceeding brought pursuant to K.S.A. 44-528 to declare an award void ab initio. In addition, the Court

⁷See *Tallman v. Case Corp.*, 31 Kan. App. 2d 1044, 77 P.3d 494 (2003).

⁸*Johnson v. General Motors Corporation*, 199 Kan. 720, 433 P.2d 585 (1967).

⁹K.S.A. 44-531(a); See also K.A.R. 51-3-9(c).

went on to say that “there is no general or common law power that can be exercised by an administrative agency.” And that the “Workers Compensation Act is substantial, complete and exclusive, covering every phase of the right to compensation and of the procedure for obtaining it.”¹⁰ An award of compensation, if not appealed from, is an adjudication of the rights and liabilities of the parties, and is open to review and modification or to be set aside only in the manner provided by the Workers Compensation Act.¹¹ Although in other cases the Kansas appellate courts have judicially granted the Board and the ALJs the power to employ certain common law remedies such as equitable estoppel,¹² the Board finds no specific reference within the Workers Compensation Act which grants the Board or an ALJ the power to set aside a settlement award that was not timely appealed. Accordingly, the Board’s authority to grant redress to the claimant in this case may have expired ten (10) days after the effective date of the SALJ’s August 10, 2002, order approving the parties’ settlement.¹³

Nevertheless, based upon the record presented, the Board finds and concludes that claimant failed to prove either that she is entitled to review and modification or that the settlement was contrary to statute. The July 22, 2004 order denying the relief sought by claimant should be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Special Administrative Law Judge Vincent L. Bogart dated, July 22, 2004 is affirmed.

IT IS SO ORDERED.

¹⁰Acosta at 396.

¹¹ *Yocum v. Phillips Petroleum Co.*, 228 Kan. 216, 612 P.2d 649 (1980); *Austin v. Phillips Petroleum Co.*, 138 Kan. 258, 25 P.2d 581 (1933).

¹² See FN 6. See also, *O’Hara v. O’Hara Painting Company, Inc.*, No. 214,169, 2000 WL 1523782 (Kan. WCAB Sept. 19, 2000) Aff’d. Case No. 86,038 (Kan. App. 2nd Oct. 2001).

¹³ See *Chambers v. Berwind Railway Services, Co.* Docket No. 212,478, 1997 WL 803443 (Kan. WCAB Dec. 3, 1997).

Dated this _____ day of January 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Matthew A. Schaefer, Attorney for Respondent and its Insurance Carrier
Vincent L. Bogart, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director