BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

KIMBERLY JACKSON	)	
Claimant	)	
V.	)	AP-00-0472-479
	)	CS-00-0258-753
JOHNSON COUNTY & BOARD OF COMMISSIONERS	)	
Self-Insured Respondent	)	

ORDER

The claimant, through Daniel Smith, requested review of Administrative Law Judge (ALJ) Julie Sample's Review and Modification Award dated November 29, 2022. Frederick Greenbaum appeared for the self-insured respondent. Due to a conflict, Board Member William Belden recused himself from this appeal. Tom Arnhold was appointed as a Board Member Pro Tem. The Board heard oral argument on April 13, 2023.

RECORD AND STIPULATIONS

The Board considered the same record as the ALJ, consisting of the:

(1) review and modification hearing transcript, held April 27, 2022;
(2) deposition transcripts of Eden Wheeler, M.D., taken August 25, 2022, and October 11, 2021;
(3) deposition transcript of John Schroeppel, M.D., taken October 7, 2022;
(4) deposition transcript of Angeline Stanislaus, M.D., taken September 13, 2022;
(5) deposition transcript of Lawrence Nieters, Ph.D., taken July 1, 2022;
(6) deposition transcript of P. Brent Koprivica, M.D., taken May 10, 2022;
(7) deposition transcript of the claimant, taken April 18, 2022;[1]
(7) Kansas Workers Compensation Board Decision, dated May 29, 2019;
(8) Award, dated February 25, 2019;
(9) deposition transcript of Pepper Jaso, taken February 18, 2019;
(10) regular hearing transcript, held January 29, 2019;
(11) deposition transcript of the claimant, taken May 10, 2018;
(12) all exhibits attached to enumerated items 2-6;
(13) documents of record filed with the Division; and
(14) the parties' briefs.

[1] This transcript was not itemized in the "Record" of the Review and Modification Award, but was cited in the Review and Modification Award.

ISSUE

Did the claimant establish "good cause" to review and modify her 2019 Award?

FINDINGS OF FACT

This case involves injuries to the claimant's right ankle, foot, lower leg, knee, hip and low back on August 11, 2016, in addition to psychological or psychiatric complaints, all alleged to be stemming from a workplace collision with a coworker, Laura Smith. The claimant testified she was assaulted by the coworker.

On May 10, 2018, the claimant testified she did not want her case to be found compensable:

> Q. Ma'am, at this time are you requesting the Judge to find that you have not sustained a work-related injury and to deny your claim for medical benefits?
>
> A. Yes.[2]

A preliminary hearing was held May 23, 2018. The claimant wanted medical treatment, but asserted her injury did not arise out of and in the course of her employment and she did not want medical treatment provided through workers compensation. The respondent admitted compensability and authorized a treating physician. ALJ Will Belden ruled the purpose of a preliminary hearing was for a worker to obtain either medical treatment or temporary total disability benefits, citing K.S.A. 44-534a(a). Because the respondent was voluntarily providing medical treatment, the preliminary hearing was moot. The ALJ indicated compensability could be taken up at regular hearing, if needed.

The claimant scheduled a prehearing settlement conference for July 25, 2018. The record from the Division of Workers Compensation concerning this hearing states the claimant denied compensability, while the respondent admitted compensability. Further, the claimant was listed as not seeking future medical treatment. The nature and extent of the claimant's disability was listed as an issue.

According to the claimant's attorney's brief, the claimant commenced a civil suit against her coworker in Johnson County District Court on July 31, 2018 (*Kimberly A. Jackson v. Laura E. Smith*, 18-CV-04249).

The regular hearing in the workers compensation claim occurred on January 29, 2019, as scheduled by the claimant. The claimant's attorney disputed his client was

---

[2] Claimant's Depo. (May 10, 2018) at 21.

injured by accident arising out of and in the course of her employment. The claimant's attorney indicated a ruling on prevailing factor was unnecessary because the claimant was not seeking any benefits because the claimant wanted the ALJ to find the case not compensable. Likewise, the claimant's attorney asserted the ALJ determining the nature and extent of the claimant's disability was moot. The claimant was not seeking future medical treatment or payment for unauthorized medical or out-of-pocket medical expenses. The claimant's attorney stated medical evidence was irrelevant to any issue before the ALJ. The respondent's attorney stated there was no evidence to support a finding the claimant sustained any permanent partial impairment. ALJ Belden said the case might be compensable and covered by the Kansas Workers Compensation Act (KWCA).

In the original Award dated February 25, 2019, ALJ Belden found the claimant's physical injuries arose out of and in the course of her employment with the respondent, but the claimant did not prove she sustained a compensable psychological or psychiatric injury. ALJ Belden stated:

> In this case, Claimant's multiple injuries include injuries to the hip and back, which make this matter compensable as a whole-body injury. No evidence was presented of Claimant's permanent impairment. Therefore, the Court concludes Claimant failed to meet her burden of she sustained permanent impairment on account of the work-related injuries of August 11, 2016 and awards no permanent disability compensation.[3]

ALJ Belden did not award unauthorized or future medical treatment, as the claimant expressly denied requesting the same.

According to the claimant's attorney, his client's civil action was dismissed under the exclusive remedy rule, but appealed to the Kansas Court of Appeals.

The claimant appealed ALJ Belden's Award, which the Board affirmed on May 29, 2019. The Board has incorporated the findings of fact set forth in such Order. The Board's decision was not appealed. The civil appeal was dismissed per the claimant's brief. Additional facts are listed below.

On October 18, 2019, the claimant filed an Application for Review and Modification. The basis for the modification was listed as, "Award is inadequate; claimant's permanent disability and impairment has increased[.]"

Following her accident in August 2016, the claimant underwent medical treatment, including two ankle surgeries, the first on May 16, 2017, and a revision surgery on August

---

[3] ALJ Award at 7.

29, 2018. After each surgery, the claimant used a scooter device where she rested her right knee on the scooter. She testified doing so caused pain and swelling of her knee.

John Paul Schroeppel, M.D., a board-certified orthopedic surgeon, began treating the claimant on January 10, 2020. The claimant gave a history of right knee pain, with no specific event or injury preceding the onset of her symptoms.

Dr. Schroeppel performed a total knee replacement on November 17, 2020. The doctor testified the degenerative condition he saw in the claimant's knee during surgery was the expected risk factor considering the claimant had a prior knee surgery as a teenager (a Hauser procedure). Dr. Schroeppel testified the most severe form of cartilage deterioration is a Grade 4, and the claimant had large areas of Grade 4 cartilage damage on both her patella and in her trochlea.

Dr. Schroeppel testified the prevailing factor causing the claimant's knee condition was degenerative joint disease and more specifically, a result of her prior patellofemoral instability and lateral maltracking as a young child. The doctor denied the claimant's use of the scooter or any rehabilitation efforts relative to the her right ankle caused any change in the physiological structure of her right knee.

Dr. Schroeppel opined physical therapy and rehabilitation associated with claimant's treatment for her right ankle did not cause any permanent impairment of function to her right knee. While the doctor believed the claimant may require future medical treatment for her knee, he indicated the prevailing factor for such treatment was not the claimant's right ankle injury.

At her attorney's request, the claimant saw P. Brent Koprivica, M.D., on August 16, 2021, for an independent medical evaluation (IME). Dr. Koprivica is board certified in occupational medicine. The claimant complained of ongoing daily right knee pain, difficulties and instability with her right knee, increasing left knee pain, ongoing right foot and ankle pain, and low back pain.

Dr. Koprivica noted significant atrophy in the claimant's right thigh compared to her left thigh, which he attributed to the claimant's altered gait. The doctor testified the claimant's low back would continue to worsen because of limping.

Dr. Koprivica believed the altered weight-bearing and use of the knee scooter after ankle surgery aggravated and accelerated the degeneration in the claimant's right knee. The doctor opined the need for a total knee replacement flowed from end-stage degenerative changes that occurred in the claimant's right knee and testified the incident of August 11, 2016, was the prevailing factor.

Dr. Koprivica admitted an altered gait by itself does not lead to a total knee replacement, but stated the altered gait aggravated and accelerated the process.

Using the AMA *Guides to the Evaluation of Permanent Impairment*, 6th ed., as a starting point, Dr. Koprivica assigned the claimant a combined 25% whole person impairment. The doctor opined the claimant will require future medical treatment, including monitoring and chronic pain management for both physical and psychological issues.

At the respondent's request, the claimant saw Eden Wheeler, M.D., a physiatrist, on April 5, 2022. The claimant complained of pain in her low back, right knee, right lateral ankle and lateral foot. The claimant reported increased pain intensity with walking, standing and moving up and down. The pain was described as a constant burning, stabbing and aching pain. She also experienced daily swelling in her right knee, with sudden giving way perhaps two to three times per week and intermittent falls.

Using the *Guides*, Dr. Wheeler assigned the claimant a combined 7% right lower extremity impairment and testified:

> . . . I again am unable to identify her work incident as prevailing factor for her intermittent right low back pain complaints. Given these opinions, 0% impairment is identified to the lower extremity and body as a whole regarding her knee and lumbar spine as relating to her work accident of 8/11/2016.
>
> Specific opinion has been requested regarding permanent impairment function that existed as of 4/18/2019, and if there has been an increase in impairment subsequent to that date. This date precedes Mrs. Jackson's right TKA, completed 11/17/2020, yet follows her 2 ankle surgical interventions. Therefore, based upon available information, I am unable to identify any change in the work-related ankle impairment since 4/18/2019.[4]

This case also has an allegation of psychological or psychiatric impairment. The claimant testified a week or two following her accident in August 2016, she began having panic attacks, anxiety and nightmares. In December 2016, she started treating with Dr. Lawrence Nieters, a licensed clinical psychologist.

Dr. Nieters testified he has treated more than 1,000 patients suffering from post traumatic stress disorder (PTSD), with about ten of them being victims of workplace assault. The doctor described the claimant sustained PTSD symptoms from the assault, including being hypervigilant, easily startled and having flashbacks, panic attacks, social anxiety, social avoidance and physical disturbances such as nausea and muscle tension. Dr. Nieters opined the claimant's psychological symptoms and diagnosis and distress were

---

[4] Wheeler Depo. at 68-69.

directly traceable to the workplace assault and resulting injuries. The claimant continues to see Dr. Nieters once a month. The doctor believed the claimant's psychiatric condition would improve once she retired in 2022. Using the *Guides*, Dr. Nieters assigned the claimant a 50% whole person impairment.

At the respondent's request, Angeline Stanislaus, a board-certified general psychiatrist and forensic psychiatrist, interviewed the claimant on May 11, 2022. The claimant reported psychological problems starting the week of her injury, including being unable to sleep because of a fear of not being able to protect herself.

Dr. Stanislaus opined the claimant does not meet the diagnostic criteria for PTSD because the claimant was not exposed to actual or threatened death or serious injury. The doctor stated the standard for serious injury is significant and creates an actual fear in a person that someone is coming to hurt them to the point that death is likely. Dr. Stanislaus opined the claimant does not have any psychiatric impairment from the accident.

As of the review and modification hearing, the claimant testified she was still experiencing anxiety, limping and back pain. She testified the limping, back pain and lightning pains into her right leg have "gotten worse" since the regular hearing in January 2019.[5] The claimant described the pain as occurring daily and rated it as an 8 for her knee, 6-8 for her foot and ankle depending on what she is doing, and 7-8 for her back and hip. She rests and takes over-the-counter pain medication for relief. She testified she uses her left foot to drive.

As part of the review and modification proceeding, the claimant's counsel stated:

> Contrary to the usual reason for a claimant to seek a regular hearing in a claim, and as part of her pursuit of the civil action, Mrs. Jackson requested a regular hearing order establishing that her August 11, 2017 injury was not work related. In effect, Mrs. Jackson sought a negative finding and did not seek at the regular hearing to obtain an award of workers compensation benefits. As both parties framed the issue, the sole concern at the regular hearing on January 29, 2019 was whether the injury was compensable as arising out of and in the course of Mrs. Jackson's employment.
>
> As a result of the parties' unique procedural posture, no medical evidence was presented as to permanent impairment or any other issue other than compensability. The evidentiary record consisted solely of Mrs. Jackson's deposition testimony of May 10, 2018. The record closed as of January 29, 2019. Regular hearing of January 29, 2019. . . .

[5] See R.M.H. Trans. at 30-31.

At the time of the January 2019 Regular Hearing, Mrs. Jackson in point of fact had not yet reached maximum medical improvement from her injuries. Dr. Vopat performed a second foot surgery in late August 2018 because the repairs from the first surgery in May 2017 had failed. She saw Dr. Vopat for follow up of the second foot surgery on February 19, 2019, three weeks after the record had closed on January 29. As of February and March 2019, Mrs. Jackson was still undergoing physical therapy of her right foot and leg; she remained off work.[6]

In the November 29, 2022 Review and Modification Award, ALJ Sample stated:

1. As a threshold matter, Claimant has failed to establish good cause to modify the Award issued on February 25, 2019. This finding alone resolves the Claimant's request to Review and Modify the Award.

2. Alternatively, Claimant has failed to establish any increase in impairment as it relates to the right foot/ankle since the entry of the Award. This finding is based upon the fact that Claimant has failed to establish any change in her condition to the ankle when compared to January of 2019, when the Award was issued. Even Dr. Koprivica says the rating to the ankle is the same now as it would have been in March 2019. Certainly, ratings could have been obtained and offered at the Regular Hearing but were not. No modification is available to Claimant because there is no way of knowing how much the foot/ankle has worsened, if at all, during the operative period.

3. Alternatively, the Award (dated February 25, 2019) concluded Claimant sustained an accidental injury, arising out of and in the course of her employment, and the accident was the prevailing factor in her injury, medical condition and disability or impairment as it relates to her right knee, hip and lower back and the Court cannot alter that finding as it is final. However, the Award did not find any impairment due to lack of evidence and only now, postaward, is the Court privy to the medical evidence to explain how the right knee, hip and lower back were arguably impacted by the accident. Respondent cannot relitigate the prevailing factor finding given the language contained in the Award. However, the Court concludes Claimant has failed to come forward with the requisite "good cause" for a modification, nor has she established a benchmark upon which the Court can determine a worsening since the entry of the Award. The Court is aware that knee surgery did not occur until after the entry of the Award and that alone might signify a worsening. Yet, according to Judge Belden, Claimant sustained injury to the right knee before the date of her Award, he just had no evidence upon which to render an Award for the permanency. And without that finding or benchmark, this finder of fact has no way to determine what the worsening might be. Given the knee replacement since the Award, the knee is probably worse in terms of permanency. However,

[6] Claimant's Brief (filed Oct. 20, 2022) at 5.

without knowing where Claimant was on the impairment spectrum at the time of her Award, it is hard to know how much worse she might be. Accordingly, the Court denies any modification to the right knee.

4. The same analysis applies to the low back complaints. Judge Belden concluded the low back was injured in the compensable accident, but he awarded no impairment due to lack of evidence. This was not a 0%--it was no impairment, due to an absence of evidence. Again, without knowing that point of reference, the Court is left without a way to determine whether, and to what extent, there is worsening. Accordingly, the Court denies any modification to the low back.

5. Claimant's request for modification to her claim for her psychological or psychiatric complaints is also denied. Judge Belden found Claimant failed to meet her evidentiary burden on this issue. He found she "presented no evidence those symptoms were directly traceable to the physical injuries she sustained, rather than the event, and no evidence from a health care provider on prevailing factor was presented." Claimant is merely relitigating Judge Belden's finding, and that is not the purpose of the review and modification process. Claimant should have provided the evidence presented in this hearing at the time of her Regular Hearing. Claimant has been treating with Dr. Nieters for quite some time--since December of 2016. Presumably, his opinions on the connection between the August 11, 2016 accident, and her psychological conditions existed during his treatment and up to the moment of the Regular Hearing. Yet, that evidence was not offered. In addition, if his opinions as to the severity of her condition changed between the time of the Award and up to the time of the Motion to Modify was filed, the record is less than persuasive. In fact, he testified she is better than when he first began treating her. So even if the Claimant could relitigate Judge Belden's finding on the psychological aspect of her claim, there is a lack of "good cause" and a lack of evidence demonstrating a worsening from the time of the Award.[7]

PRINCIPLES OF LAW AND ANALYSIS

The claimant argues she is entitled to modification of her Award based on the change of circumstances and the inadequacy of the Award based on the evidence. The claimant contends she is entitled to a 25% whole person impairment for the physical injuries to her right leg and low back, in addition to a 50% whole person impairment for the psychological injuries directly traceable to the 2016 event and physical injuries.

The respondent maintains the Review and Modification Award should be affirmed. The respondent asserts: (1) the claimant failed to prove good cause to warrant Review and

[7] R & M Award, at 16-18. (Footnotes omitted.)

Modification; (2) the claimant failed to prove the Award was inadequate or she sustained a change of impairment because there was no impairment established at regular hearing; and (3) if review and modification was allowed, the work accident was not the prevailing factor causing impairment to the claimant's right knee injury, lower back injury, or psychological injury.

When a workers compensation statute is plain and unambiguous, a court must give effect to its express language.[8]

The claimant carries the burden of proof to establish a compensable claim. K.S.A. 44-501b states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
>
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
>
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.
>
> (d) Except as provided in the workers compensation act, no employer, or other employee of such employer, shall be liable for any injury, whether by accident, repetitive trauma, or occupational disease, for which compensation is recoverable under the workers compensation act nor shall an employer be liable to any third party for any injury or death of an employee which was caused under circumstances creating a legal liability against a third party and for which workers compensation is payable by such employer.

"The overarching purpose of the hearing process lies in giving the parties a reasonable opportunity to fairly air the evidence bearing on the claim for benefits."[9] K.S.A. 44-523, which concerns hearing procedure, states:

---

[8] *See Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009).

[9] *Goss v. Century Mfg., Inc.*, No. 108,367, 2013 WL 3867840, at *3 (Kansas Court of Appeals unpublished opinion filed July 26, 2013).

> (a) The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, ensure the employee and the employer an expeditious hearing and act reasonably without partiality.
>
> (b) Whenever a party files an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, the matter shall be assigned to an administrative law judge for hearing and the administrative law judge shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than 30 days after the first full hearing before the administrative law judge and to require the respondent to submit all evidence in support of the respondent's position no later than 30 days thereafter. . . .

K.S.A. 44-523(b) plainly states the ALJ may set a hearing and the claimant is expected to present all evidence in support of his or her claim no later than 30 days after the first full hearing. In workers compensation parlance, the "full hearing" is synonymous with a "regular hearing."

As an initial observation, the claimant took some risk in proceeding to a full hearing or a regular hearing with the hope the ALJ would determine the claim did not arise out of and in the course of employment. The claimant asserted her claim was not compensable and she was not seeking benefits under the KWCA. The respondent, which did not have the burden of proving anything, stated through counsel at the regular hearing that the claimant had not presented evidence of permanent impairment. The ALJ stated he might find the case compensable.

Contrary to the claimant's assertion, the scope of the ALJ's inquiry was not limited to determining if the claimant sustained personal injury by accident arising out of and in the course of her employment. This may have been what the claimant wanted, but there is no such agreement, and the ALJ had full jurisdiction to rule on every element of the claim. The respondent admitted compensability at the prehearing settlement conference and the nature and extent of disability was at issue. The claimant had the opportunity to present her claim and attempt to prove compensability, but made a strategic decision not to do so, hoping the KWCA would not apply and she could continue to pursue her civil case against Ms. Smith. However, K.S.A. 44-501b(d) states the exclusive remedy for a compensable workers compensation claim is against the respondent, not against a purportedly negligent coworker.

Similarly, there was no agreement between the parties or the ALJ, or even any procedure, to use a regular hearing to try a case on a piecemeal basis.[10] The KWCA does

---

[10] In the context of civil litigation, courts do not condone piecemeal litigation. See *AMCO Ins. Co. v. Beck*, 258 Kan. 726, 728, 907 P.2d 137 (1995).

not provide for declaratory judgments. A claimant may not proceed to a regular hearing on one issue, and subsequent regular hearings on alternative issues. Rather, the regular hearing provided the claimant a full opportunity to prove her case. The claimant did not avail herself of this day in court, instead "rolling the dice" in the hope the KWCA did not apply to her case.

The review and modification statute, K.S.A. 44-528, states:

> (a) Except lump-sum settlements approved by the director or administrative law judge, any award or modification thereof 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. . . . 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, pursuant to the provisions set forth in K.S.A. 44-510b, 44-510c, 44-510d or 44-510e, and amendments thereto, as may be applicable.
>
> . . .
>
> (d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that 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 under this section.

The above statute does not allow review and modification automatically. Rather, the requirements listed in the statute are: (1) a showing of good cause to review and modify an award; (2) a finding the award was based on fraud or undue influence, or the award was made without authority or resulting from serious misconduct, or the award is excessive or inadequate or the functional impairment or work disability of the employee has increased or diminished; and (3) any modification is not effective more than six months prior to the filing of the application.

The first hurdle is whether the claimant had good cause to review and modify the award. "Good cause" is not defined by the KWCA. Similarly, the term "for cause" is not defined in the KWCA. "Cause" is referenced in the Act regarding an employee being terminated for cause.[11] "What constitutes a termination "for cause" is subject to

[11] See K.S.A. 44-510e(a)(2)(E)(i).

interpretation. The United States Supreme Court noted the term "cause" is a broad and general standard and a more specific definition would be impracticable given the "infinite variety of factual situations [that] might reasonably justify dismissal for 'cause' . . . ."[12] Thus, it would appear the term "cause" in our Act is not plain or unambiguous, but is broad, general and, according to the highest Court in the land, not practically subject to a precise definition.

"Good cause" has also been applied to situations in which an employer arguably discharged a worker to avoid facing a work disability award:

> "[T]he proper inquiry to make when examining whether good cause existed for a termination in a workers compensation case is whether the termination was reasonable, given all of the circumstances. Included within these circumstances to consider would be whether the claimant made a good faith effort to maintain his or her employment. Whether the employer exercised good faith would also be a consideration. In that regard, the primary focus should be to determine whether the employer's reason for termination is actually a subterfuge to avoid work disability payments." *Morales-Chavarin v. National Beef Packing Co.*, No. 95,261, 2006 WL 2265205, at *5 (Kan. App. 2006) (unpublished opinion).[13]

Morales-Chavarin discussed numerous Kansas cases and arrived at a standard of reasonableness based on all the circumstances, including the good faith of the parties. Of note, *Morales-Chavarin* did not adopt a definition of "for cause" that was referenced in *Decatur*.[14] In such case, the Kansas Supreme Court did not specify or adopt a definition of "for cause." Rather, it simply recited the 10th Circuit's definition of the word "cause" in Weir,[15] which states, "A discharge for cause is one which is not arbitrary or capricious, nor is it unjustified or discriminatory."[16]

Good cause is mentioned in K.S.A. 44-523(f) in the context of extending the time frame to prosecute a claim. Under K.S.A. 44-523(f)(1), "a workers compensation claimant

---

[12] *Arnett v. Kennedy*, 416 U.S. 134, 161, 94 S. Ct 1633, 40 L.Ed.2d 15 (1974), overruled on other grounds by *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

[13] *Oliver v. Nat'l Beef Packing Co.*, No. 123,601, 2021 WL 5984170, at *6 (Kansas Court of Appeals unpublished opinion filed Dec. 17, 2021).

[14] *Decatur County Feed Yard, Inc. v. Fahey*, 266 Kan. 999, 974 P.2d 569 (1999).

[15] *Weir v. Anaconda Co.*, 773 F.2d 1073 (10th Cir.1985).

[16] *Id.* at 1080. *Decatur*, while not clearly defining "cause," also touched on "reasonableness" and "good faith and fair dealing." *Decatur*, 266 Kan. at 1008 and 1010. *Gorham v. City of Kansas City*, 225 Kan. 369, 373-74, 590 P.2d 1051 (1979), which involved removing police officers from employment for "just cause," equated the term "cause" as being "legal cause, or just cause, a substantial, reasonable or just cause . . . .").

must move for an extension within three years of filing an application for hearing if the claim is to survive a proper motion to dismiss. However, any further extensions thereafter are at the sole discretion of the administrative law judge for good cause shown."[17]

"Good cause" is also examined to determine if a criminal defendant may withdraw a plea "for good cause shown." These factors include: (1) whether the defendant was represented by competent counsel, (2) whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of, (3) whether the plea was fairly and understandingly made.[18] and (4) other non-exclusive factors within judicial discretion.[19]

"Good cause" is also analyzed in whether an employee voluntarily resigned in the context of employment security law, as well as whether good cause exists to remove a tenured professor, but those scenarios do not translate well regarding whether an award should be reviewed and modified.

The claimant does not expressly state why "good cause" to review and modify the original Award exists. Arguably, the claimant considers "good cause" to exist if the original Award was unjust or inadequate. The Board is not convinced the different elements of K.S.A. 44-528 are repetitive or mean the same thing.

The ALJ, on several occasions, stated the claimant did not have good cause to seek review and modification. The Board agrees with the ALJ. First, the claimant had control over the pace of the litigation. Everything she did in the context of review and modification should have been done at the regular hearing and within her deadline to submit evidence (her terminal date). The claimant is using the review and modification proceeding to do what she should have done at the regular hearing. The review and modification process is not meant to be a "redo" or a second regular hearing.

Second, the claimant has taken conflicting positions. At the regular hearing, the claimant asserted her claim was not compensable and she was not seeking any benefits. Having lost following the regular hearing, the claimant now asserts the ALJ was correct in finding the case compensable, and she should be given another chance to prove entitlement to permanent partial disability benefits stemming from permanent impairment, as well as medical treatment. It is not "good cause" to take inconsistent legal positions.

---

[17] *Gerlach v. Choices Network, Inc.*, 61 Kan. App. 2d 268, Syl. ¶ 5, 503 P.3d 1033 (2021).

[18] *State v. Aguilar*, 290 Kan. 506, 511, 231 P.3d 563 (2010).

[19] *Id.* at 512, 231 P.3d 563. See also *State v. Anderson*, 291 Kan. 849, 856, 249 P.3d 425 (2011) ("The district court also may consider other factors when determining whether good cause is shown.").

Similarly, it is difficult to find fault in the original Award. The claimant contends the original Award failed to provide just compensation. The claimant proceed to a regular hearing without evidence of permanent functional impairment, stated medical evidence was irrelevant, and contended the nature of extent of disability was moot. Even if the original Award was unjust, it was precisely based on the lack of evidence set forth by the claimant. It is a difficult argument for the claimant to request the ALJ to not award compensation and then complain the ALJ should have awarded compensation.

The claimant states the ALJ's original Award was solely based on her deposition testimony of May 10, 2018. To the extent this is a complaint, the claimant could have presented additional evidence prior to the original Award being decided. The claimant also states the original Award should be modified because she was still receiving medical treatment and off work at the time of the regular hearing. Again, the claimant could control the pace of the litigation. If the claimant wanted to delay a regular hearing until after she reached maximum medical improvement or was returned to work, she could have done so.

The claimant's argument the original Award was for a 0% impairment of function is incorrect. The claimant simply failed to establish her degree of functional impairment.

The problems the claimant complains about regarding the original Award were based on the claimant's litigation strategy and the consequences of hoping the ALJ and the Board would find her personal injuries did not arise out of and in the course of her employment.

When looking at "good cause," the Board has considered the entire record and all circumstances, including fairness, the interest of justice, reasonableness, good faith and the ALJ's discretion in the first instance. ALJ Sample repeatedly stated the claimant did not have good cause for review and modification. The Board agrees. The claimant did not have good cause for review and modification under K.S.A. 44-528. The claimant elected to pursue an "all or nothing" gambit, hoping the case would not be found compensable after the regular hearing. That approach failed. The claimant has now altered her legal theory. Her chance to pursue benefits was at the regular hearing. She chose not to pursue benefits. She now wants a second opportunity to do what should have been done in the first place. This strategy is not good cause. Again, the Board agrees with ALJ Sample on this issue.

Given this ruling, the Board need not examine whether the award was based on fraud or undue influence, or the award was made without authority or resulting from serious misconduct, or the award is excessive or inadequate or the functional impairment or work disability of the employee has increased or diminished.

AWARD

WHEREFORE, the Board affirms the Review and Modification Award dated November 29, 2022. The claimant did not prove good cause to seek review and modification.

IT IS SO ORDERED.

Dated this _____ day of May, 2023.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: (via OSCAR)
Daniel Smith
Frederick Greenbaum
Hon. Julie Sample