

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**HOWARD A. JOHNSON III**  
Claimant

v.

**US FOOD SERVICE**  
Respondent

AP-00-0457-847  
CS-00-0148-846  
Docket No. 1,075,741

and

**AMERICAN ZURICH INS. CO.**  
Insurance Carrier

**ORDER**

Claimant requested review of the Review & Modification Award, dated May 5, 2021, issued by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on September 23, 2021.

**APPEARANCES**

Mark E. Kolich appeared for Claimant. Michelle Daum Haskins appeared for Respondent and Insurance Carrier.

**RECORD AND STIPULATIONS**

The Board adopted the stipulations and considered the same record as ALJ Hursh, consisting of the Transcript of Review and Modification Hearing Taken via Videoconference, held April 29, 2021, including Exhibits 1-3; the transcript of Deposition of Harold A. Hess, M.D., taken January 6, 2017, including Exhibits 1-4; the transcript of Deposition of P. Brent Koprivica, M.D., taken January 27, 2017, including Exhibit 1; and the pleadings and orders contained in the administrative file.

**ISSUES**

1. Does the Appeals Board possess authority to consider Claimant's Application for Review and Modification?
2. If the Appeals Board possesses authority to consider Claimant's Application for Review and Modification, what is the nature and extent of Claimant's disability?

### FINDINGS OF FACT

Claimant sustained personal injuries from an accident arising out of and in the course of his employment with Respondent on October 16, 2015. As a result of the accident, Claimant suffered disc herniations at C5-6 and C6-7 with spinal cord compression and myeloradiculopathy. On January 14, 2016, Dr. Hess, the authorized neurosurgeon, performed a two-level anterior cervical discectomy and fusion requiring implantation of hardware. Claimant reached maximum medical improvement on July 18, 2016, and Dr. Hess noted no complaints of pain, residual stiffness and tightness in the neck, and normal strength. Dr. Hess released Claimant to return to work full duty without restrictions, and had no further contact with Claimant. Claimant continues to perform his usual work for Respondent.

At the request of the insurance carrier, Dr. Hess issued a functional impairment rating. Based on the *AMA Guides to the Evaluation of Permanent Impairment*, 6<sup>th</sup> Edition (*AMA Guides*, 6<sup>th</sup> Edition), Dr. Hess rated Claimant's permanent impairment at 6% of the body as a whole attributable to the two-level cervical fusion. At his deposition, Dr. Hess testified Claimant's permanent functional impairment was 25% of the body as a whole, attributable to the two-level cervical fusion, based on the *AMA Guides to the Evaluation of Permanent Impairment*, 4<sup>th</sup> Edition (*AMA Guides*, 4<sup>th</sup> Edition). Dr. Hess believed Claimant's impairment was actually closer to 25% of the body as a whole because Claimant underwent a two-level cervical fusion, and because Claimant may require additional medical treatment for adjacent segment disorder. Dr. Hess also believed the *AMA Guides*, 6<sup>th</sup> Edition, unfairly penalized patients who returned to work full duty, and did not accurately depict Claimant's permanent impairment. Dr. Hess confirmed no advances in neurosurgical technique were made between the time impairment was assessed under the *AMA Guides*, 4<sup>th</sup> Edition and the *AMA Guides*, 6<sup>th</sup> Edition. On cross-examination, Dr. Hess conceded Claimant had a good result from the two-level cervical fusion procedure.

Dr. Koprivica performed a records review at the request of Claimant's counsel, but did not evaluate Claimant. Dr. Koprivica thought Claimant sustained a serious cervical injury requiring a two-level cervical fusion with a good result. Dr. Koprivica thought it was possible the spinal cord sustained residual damage from the compression caused by the herniations. Claimant was also thought to be at risk for the vertebral segments adjacent to the fusion breaking down quicker due to the lack of motion in the fused segments. Dr. Koprivica thought Claimant's functional impairment under the *AMA Guides*, 6<sup>th</sup> Edition, was 6% of the body as a whole, but Claimant's functional impairment under the *AMA Guides*, 4<sup>th</sup> Edition, was 25-35% of the body as whole. In Dr. Koprivica's opinion, Claimant's functional impairment was more appropriately rated at 25% of the body as a whole because two vertebral levels with spinal cord and nerve root impingement were involved.

Dr. Koprivica did not believe advances in treatment and surgical techniques could account for the lower impairment rating under the *AMA Guides*, 6<sup>th</sup> Edition.

Following the regular hearing and submission of evidence, ALJ Hursh issued an award of permanent partial disability based on 6% functional impairment of the body as a whole, attributable to the cervical spine, based on the *AMA Guides*, 6<sup>th</sup> Edition.<sup>1</sup> ALJ Hursh noted cervical spine injuries, as unscheduled injuries, were governed by K.S.A. 44-510e, which requires permanent impairment to be established by competent medical evidence and based on the *AMA Guides*, 6<sup>th</sup> Edition. ALJ Hursh found both Dr. Hess and Dr. Koprivica stated it was appropriate to rate Claimant's impairment at 6% of the body as a whole under the *AMA Guides*, 6<sup>th</sup> Edition. Therefore, Claimant was entitled to permanent partial disability compensation based on 6% functional impairment to the body as a whole.<sup>2</sup> Future medical treatment was awarded.<sup>3</sup> ALJ Hursh also ruled the Court did not possess legal authority to consider the constitutional issue of whether awarding permanent partial disability compensation based on the *AMA Guides*, 6<sup>th</sup> Edition, constituted an adequate substitute remedy.<sup>4</sup>

Claimant appealed the constitutional issue to the Appeals Board. The parties jointly requested the Appeals Board consider the issue on an expedited basis.<sup>5</sup> The Appeals Board issued its Order, dated May 17, 2017, ruling it did not possess jurisdiction to address Claimant's constitutional arguments and otherwise affirming the underlying Award.<sup>6</sup>

Claimant appealed to the Kansas Court of Appeals. The Court of Appeals found K.S.A. 44-510e mandated the use of the *AMA Guides*, 6<sup>th</sup> Edition, without deviation, which emasculated the Workers Compensation Act to the point it no longer provided an adequate substitute remedy for injured workers, which violated the Kansas Constitution.<sup>7</sup> The Court of Appeals remanded this matter to the administrative law judge with instructions to determine Claimant's permanent impairment under the *AMA Guides*, 4<sup>th</sup> Edition.<sup>8</sup>

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<sup>1</sup> See ALJ Award (Apr. 4, 2017) at 3, 5.

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 4.

<sup>5</sup> See Application for Expedited Decision, (Apr. 13, 2017).

<sup>6</sup> See WCAB Order, (May 17, 2017), at 2.

<sup>7</sup> See *Johnson v. U.S. Food Service*, 312 Kan. 597, 600, 478 P.3d 776 (2021).

<sup>8</sup> *Id.*

The State of Kansas intervened in the constitutional litigation, and sought review by the Kansas Supreme Court. The Kansas Supreme Court reversed the Court of Appeals' decision. The Supreme Court interpreted K.S.A. 44-510e to require determinations of permanent impairment to be based on competent medical evidence and based on the *AMA Guides*, 6<sup>th</sup> Edition. To determine impairment under K.S.A. 44-510e, the *AMA Guides*, 6<sup>th</sup> Edition, is used as a starting point, but a physician can use his or her judgment to determine the injured worker's impairment.<sup>9</sup> Because a physician retained discretion in assessing impairment, K.S.A. 44-510e did not raise the constitutional issue identified by the Court of Appeals under the Rule of Constitutional Avoidance.<sup>10</sup> Accordingly, the decision of the Court of Appeals was reversed, and the decision of the Appeals Board was affirmed.<sup>11</sup>

Claimant subsequently filed his Motion to Modify with the Kansas Supreme Court, requesting the matter be remanded for reconsideration of Claimant's functional impairment consistent with the Court's ruling. Respondent opposed Claimant's Motion. The Court issued an order denying the Motion without explanation.<sup>12</sup>

On March 1, 2021, Claimant filed his Application for Review and Modification, seeking modification of the permanent partial disability award based on 6% functional impairment of the body as a whole because the award was inadequate. A hearing on Claimant's Application took place on April 29, 2021. No new medical evidence was submitted at the hearing, and no testimony was taken. Copies of the Motion to Modify Claimant filed with the Kansas Supreme Court, Respondent's reply to the Motion to Modify, and the Court's Order denying the Motion were admitted into evidence.

On May 5, 2021, ALJ Hursh issued the Review & Modification Award. After reviewing the record, which was the same record submitted at regular hearing, ALJ Hursh noted the Kansas Supreme Court held use of the *AMA Guides*, 6<sup>th</sup> Edition, was constitutional. ALJ Hursh also found Dr. Hess' and Dr. Koprivica's preferences for using the *AMA Guides*, 4<sup>th</sup> Edition, in determining Claimant's impairment were not based on the *AMA Guides*, 6<sup>th</sup> Edition, which was still required under K.S.A. 44-510e. ALJ Hursh concluded the underlying Award was adequate "in terms of the statutory language and the Kansas Supreme Court's interpretation."<sup>13</sup> ALJ Hursh also stated, "If the claimant

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See R.M.H. Trans., Resp. Ex. at Ex. 1-3.

<sup>13</sup> R.M. Award (May 5, 2021) at 4.

intended by this proceeding to re-try the issue of whether the 6<sup>th</sup> Edition was a constitutionally adequate quid pro quo, that issue has already been decided by courts of jurisdiction.”<sup>14</sup> The Application for Review and Modification was denied. This appeal follows.

### **PRINCIPLES OF LAW AND ANALYSIS**

Claimant argues the Review & Modification Award is erroneous because the Kansas Workers Compensation Act provides for modification of an award if it is inadequate, and the competent medical evidence in the record proves the original award of permanent partial disability should be modified to reflect 25% impairment of the body as a whole. Respondent and Insurance Carrier argue the Review & Modification Award should be affirmed because there is no change in circumstances rendering the original award of permanent partial disability compensation inadequate, and because Claimant is barred from relitigating nature and extent under *res judicata*.

The Workers Compensation Act provides any award, except for lump-sum settlements approved by the Director or an administrative law judge, may be reviewed by the administrative law judge for good cause shown by the applicant. After hearing all competent evidence, if the administrative law judge finds the award was obtained by fraud or undue influence, was made without authority or as a result of serious misconduct, was excessive or inadequate, or the functional impairment or work disability of the employee increased or diminished, the administrative law judge may modify the award.<sup>15</sup>

When a workers compensation statute is plain and unambiguous, a court must give effect to its express language.<sup>16</sup> The plain language of K.S.A. 44-528 does not limit review and modification only to cases where the impairment or disability of the injured worker increased or decreased due to a change in physical condition. The statute also provides an award may be modified if it is excessive or inadequate, without reference to a change in physical condition.

The Review & Modification Award states: “Nothing in the physicians’ testimony indicated their ratings based on the 6<sup>th</sup> Edition were less than competent medical evidence. Their preferred 4<sup>th</sup> Edition ratings were also competent medical evidence of impairment, but were clearly based on the 4<sup>th</sup> Edition, not the required 6<sup>th</sup> Edition.”<sup>17</sup> This analysis did

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<sup>14</sup> *Id.*

<sup>15</sup> See K.S.A. 44-528(a).

<sup>16</sup> See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009).

<sup>17</sup> R.M. Award (May 5, 2021) at 4.

not consider whether Claimant's functional impairment was based on competent medical evidence, which is required under the Kansas Workers Compensation Act.<sup>18</sup> To determine whether the original award of compensation is adequate, the proper inquiry is whether Claimant's functional impairment is based on competent medical evidence, not whether the original award was flawed because it was based on incompetent evidence. Because the Review & Modification Award did not correctly assess the adequacy of the original award, it should be reversed.

Consistent with its authority to conduct de novo review,<sup>19</sup> the Appeals Board considers whether Claimant's Application for Review and Modification should be granted. It is undisputed Claimant sustained cervical spine injuries, which are compensable as unscheduled injuries under K.S.A. 44-510e. Functional impairment for unscheduled injuries is determined by competent medical evidence, using the *AMA Guides*, 6<sup>th</sup> Edition, as a starting point.<sup>20</sup> The rating physician may exercise his or her discretion in assessing impairment, and still provide competent medical evidence.

The original award of permanent partial disability was based solely on the *AMA Guides*, 6<sup>th</sup> Edition. Dr. Hess testified, within a reasonable degree of medical certainty, Claimant's functional impairment was 25% of the body as a whole, although the *AMA Guides*, 6<sup>th</sup> Edition, only provided for 6% of the body as a whole. The award indicates competent medical evidence was considered, but it does not address Dr. Hess' testimony the *AMA Guides*, 6<sup>th</sup> Edition, penalizes patients who return to work full duty. The award does not address Dr. Hess' belief Claimant's impairment was closer to 25% of the body as a whole due to the two-level cervical fusion and the chance additional medical treatment was necessary. Dr. Hess' professional opinion was not based solely on the *AMA Guides*, 4<sup>th</sup> Edition, and was the product of his expertise and discretion. Dr. Hess' 25% impairment rating was competent medical evidence.

The award also does not address Dr. Koprivica's opinion, which bolsters Dr. Hess' rating. Dr. Koprivica, who did not evaluate Claimant, thought Claimant's actual impairment was 25-35% of the body as a whole under the *AMA Guides*, 4<sup>th</sup> Edition, and was more appropriately rated at 25% of the body as a whole, based on a records review. The Appeals Board finds the opinions of Dr. Hess more credible because he actually examined Claimant on multiple occasions as the treating physician, but Dr. Koprivica provides further competent medical evidence Claimant's impairment is greater than 6% of the body as a whole.

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<sup>18</sup> See K.S.A. 44-510e(a)(2)(B).

<sup>19</sup> See K.S.A. 44-551(l)(1).

<sup>20</sup> See *Johnson v. U.S. Food Service*, 312 Kan. 597, 603, 478 P.3d 776, 603 (2021).

After considering the unique evidence in this case, the Appeals Board finds, based on the competent medical evidence of Dr. Hess after using the *AMA Guides*, 6<sup>th</sup> Edition, as a starting guideline, Claimant's functional impairment is 25% of the body as a whole attributable to the cervical spine. The Appeals Board finds the resulting original award of permanent partial disability compensation based on 6% functional impairment to the body as a whole is inadequate. Under K.S.A. 44-528(a), Claimant is entitled to review and modification. The award of permanent partial disability compensation should be modified to reflect 25% functional impairment of the body as a whole attributable to the cervical spine.

Respondent argues review and modification is barred under *res judicata*. Generally, a review and modification proceeding is not the proper means to attack the validity of the original award, and issues regarding the compensability of the initial injury previously litigated in the original award may not be relitigated in post-award proceedings.<sup>21</sup> Issues of nature and extent, which are subject to modification, are not subject to *res judicata*.<sup>22</sup> *Res judicata* is a rule of convenience, however, and not to be applied so rigidly as to defeat the ends of justice.<sup>23</sup>

Claimant does not seek to relitigate the constitutionality of the Kansas Workers Compensation Act. Moreover, Claimant is not relitigating a "final" issue not subject to review and modification. Claimant seeks a determination of functional impairment using the methodology from K.S.A. 44-510e. Not only is *res judicata* inapplicable, allowing *res judicata* to bar review and modification proceedings would render K.S.A. 44-528 superfluous. Respondent's argument advocating *res judicata* fails.

The Appeals Board concludes Claimant's original award should be modified upwards based on 25% functional impairment to the body as a whole attributable to the cervical spine. Because this modification is not premised on a change in physical condition causing Claimant's functional impairment or work disability to change, the six-month limitation contained in K.S.A. 44-528 does not apply,<sup>24</sup> and the entire award of permanent partial disability compensation is due and owing, less the compensation previously paid by Respondent and Insurance Carrier.

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<sup>21</sup> See *Bazil v. Detroit Diesel Central Remanufacturing*, No. 99,613, 2008 WL 5401467, at \*4-5 (Kansas Court of Appeals unpublished opinion filed Dec. 19, 2008).

<sup>22</sup> See *id.*, at 5; see also *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 396, 510 P.2d 1190 (1973).

<sup>23</sup> See *Cain v. Jacox*, 302 Kan. 431, 435, 354 P.3d 1196 (2015).

<sup>24</sup> See K.S.A. 44-528(d).

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board the Review & Modification Award, dated May 5, 2021, issued by ALJ Kenneth J. Hursh is reversed. The original award of permanent partial general disability compensation is modified to reflect 25% functional impairment of the body as a whole, attributable to the cervical spine, pursuant to K.S.A. 44-510e.

As of the date of this Order, Claimant is entitled to an award of compensation to be paid by Respondent and Insurance Carrier. Claimant is awarded 25.43 weeks of temporary total disability compensation, paid at \$610.00 per week, totaling \$15,511.42, followed by 101.14 weeks of permanent partial disability compensation based on 25% functional impairment of the body as a whole, paid at \$610.00 per week, totaling \$61,695.40, for a total award of \$77,206.82, which is all due and owing, and shall be paid by Respondent and Insurance Carrier, less any compensation previously paid.

Claimant’s counsel’s attorney fee contract complies with K.S.A. 44-536 and is approved. Claimant’s counsel is granted an attorney’s fee of 25% of the additional compensation awarded, which shall be paid from the compensation awarded herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2021.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: (Via OSCAR)

Mark E. Kolich  
Michelle Daum Haskins  
Hon. Kenneth J. Hursh