

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**GERARD KLEINSMITH**  
Claimant

v.

**TRADITIONAL TRUCKING, INC.**  
Respondent

AP-00-0492-560  
CS-00-0463-132

and

**AIU INSURANCE CO.**  
**(NATIONAL UNION FIRE OF PITTS PA)**  
Insurance Carrier

**ORDER**

Respondent and Insurance Carrier (Respondent) seek review of the September 26, 2025, Review and Modification Award issued by Administrative Law Judge (ALJ) Brian Brown. The Board heard oral argument on February 12, 2026.

**APPEARANCES**

Jeff K. Cooper appeared for Claimant. John E. Ryan appeared for Respondent.

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the Transcript of Review and Modification, held August 27, 2025, including Claimant's Exhibits 1-4 and Respondent's Exhibits A-B, and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

**ISSUES**

1. Was the award of future medical treatment erroneous?
2. Was the award of permanent partial general disability compensation based on work disability considerations erroneous?

**FINDINGS OF FACT**

Claimant sustained a compensable low-back injury while working as a truck driver for Respondent on October 29, 2021. Claimant's medical history was notable for a prior low back injury from a motor vehicle accident occurring in 1999. Claimant received treatment

at an emergency room for the prior injury, but did not require ongoing medical treatment or permanent restrictions.

Following the accident of October 29, 2021, Claimant underwent an MRI scan, which was interpreted as showing disc degeneration at L4-5 and L5-S1. Claimant received conservative treatment, followed by pain management treatment by Dr. Nicolae. Claimant underwent medial branch blocks and radiofrequency ablation, and he was prescribed pain medication. Claimant's low back remains symptomatic, and he remains under Dr. Nicolae's care. Permanent work restrictions were not imposed in the original claim.

Claimant initially returned to work for Respondent as a truck driver. In March 2022, Claimant was involved in a motor vehicle accident while working. Claimant denied suffering further injury to his low back from the accident. Claimant, however, was transferred to working in Respondent's office, where he worked primarily as a dispatcher.

During the litigation of the original claim, Claimant was evaluated by Dr. Aks on April 7, 2022, and March 28, 2023, at the request of his attorney. Dr. Aks opined Claimant's prior low back pain from 1999 previously resolved without residual problems. Dr. Aks diagnosed Claimant with chronic lumbar spine pain, right lumbar facet syndrome, possible discogenic pain and right-sided sacroiliitis caused by the October 29, 2021, accident. Dr. Aks reviewed the MRI report, rather than the scan, and thought it displayed acute and degenerative changes. Dr. Aks recommended future medical treatment, but did not impose permanent restrictions. Dr. Aks rated Claimant's functional impairment at 8% of the body as a whole, which he attributed to the October 29, 2021, accident. In his deposition, Dr. Aks confirmed he did not apportion any part of his rating for preexisting impairment. Dr. Aks also testified all of Claimant's symptoms were caused by the injuries sustained on October 29, 2021, and Claimant had no preexisting lumbar facet syndrome.

Claimant was also evaluated by Dr. Bailey, at Respondent's request, on July 25, 2023. Dr. Bailey believed Claimant suffered from preexisting facet-mediated pain and discogenic low back pain, which was aggravated by the October 29, 2021, accident, as well as acute strains and contusions. Dr. Bailey thought Claimant could continue working regular duty. Dr. Bailey rated Claimant's functional impairment at 8% of the body as a whole, with 4% of the body as a whole preexisting.

On January 24, 2024, ALJ Brown issued the original Award. Claimant's average weekly wage was determined to be \$1,489.70. ALJ Brown found and concluded the October 29, 2021, accident was the prevailing factor causing a compensable worsening of Claimant's prior low back injury, and noted both Drs. Aks and Bailey identified compensable injuries. ALJ Brown concluded Claimant sustained 8% functional impairment of the body as a whole globally, attributable to the low back, and 1% functional impairment was preexisting based on the prior injury and treatment. Claimant was awarded permanent partial disability compensation based on 7% functional impairment of the body as a whole.

Future medical treatment was also awarded. Neither party sought review of the Award by the Appeals Board.

In January 2024, Respondent transferred Claimant from the office to the plant, which required Claimant to walk on concrete floors. Respondent did not give Claimant a reason for the transfer. Walking on the concrete floors made Claimant's back hurt, and he told management he could not handle walking on concrete floors. Claimant was receiving medical treatment for his low back by his primary care physician and Dr. Nicolae. Claimant testified the primary care physician imposed permanent restrictions, which were provided to Respondent. Neither the primary care physician, nor Dr. Nicolae, testified. Any record of restrictions from those providers are not in evidence.

On March 4, 2024, Respondent terminated Claimant without explanation. Following Respondent's termination, Claimant applied for and received unemployment benefits for approximately two months. Claimant subsequently worked for seven weeks at U.S. Foods as a dispatcher. Claimant later obtained work as a transportation supervisor for Harvesters, which offered more money and better working conditions. The pay records from Harvesters were admitted into evidence, and document forty-seven weeks of earnings averaging \$1,266.30 per week. Claimant continues working for Harvesters.

On March 12, 2024, Claimant filed an application for review and modification of the January 24, 2024, Award, based on the March 4, 2024, termination. Claimant sought modification of the prior award of permanent partial disability based on functional impairment to an award based on work disability. At the request of his attorney, Claimant was evaluated by Dr. Aks and Mr. Thomas, a vocational specialist. At the request of Respondent, Claimant was evaluated by Dr. Bailey and Mr. Benjamin, a vocational specialist. During the review and modification proceedings, Claimant testified he had difficulty having return appointments with Dr. Nicolae, and he also requested an order designating Dr. Nicolae as the authorized treating physician.

Dr. Aks reevaluated Claimant on December 9, 2024, and reviewed additional medical records from Dr. Nicolae. Dr. Aks did not know if Dr. Nicolae imposed work restrictions. Dr. Aks testified Claimant's functional impairment had not changed since his evaluation of March 28, 2023.

Dr. Aks also reviewed Dr. Bailey's records, and noted Dr. Bailey opined Claimant's condition was multifactorial, including preexisting pathologies, and half of Claimant's impairment should be apportioned to preexisting conditions. Dr. Aks stated in his narrative report dated December 9, 2024, he disagreed with Dr. Bailey's opinions, Claimant's prior injury resolved without residual problems, and he stood by his prior impairment rating.

Dr. Aks, however, subsequently stated in a supplement report, and in his deposition, he believed Claimant's preexisting impairment was 2% of the body as a whole based on

degenerative changes established by the prior MRI. Dr. Aks confirmed Claimant's total functional impairment, including the preexisting impairment, was 10% of the body as a whole. According to Dr. Aks, he did not provide an opinion on preexisting impairment during the initial litigation because he was not asked. Dr. Aks confirmed Claimant's preexisting and global impairment ratings were based on Claimant's condition when he was initially rated. Dr. Aks also imposed permanent work restrictions of no sitting more than three hours or standing more than one hour; no walking more than one-half mile without stopping; no lifting more than twenty-five pounds floor to waist; no lifting more than twenty pounds waist to shoulder; no overhead lifting over fifteen pounds; and no frequent stairs. After reviewing a task list generated by Mr. Thomas, Dr. Aks thought Claimant's task loss, on account of the injuries sustained on October 29, 2021, was 70%.

Mr. Thomas performed a vocational evaluation of Claimant via telephone on or about December 28, 2024, and Mr. Thomas subsequently testified. Mr. Thomas reviewed medical records from Dr. Goulart, Stormont-Vail, Dr. Nicolae, Dr. Bailey and Dr. Aks, and noted the only physician who imposed restrictions was Dr. Aks. Mr. Thomas generated a task list. According to Mr. Thomas's report, Claimant was working in an accommodated position, was capable of earning \$900.00 per week, and could not earn a higher wage in the open labor market. During his deposition, Mr. Thomas confirmed he was provided wage records from Harvesters and still believed Claimant was capable of earning \$900.00 per week. Mr. Thomas later announced he changed his mind, and Claimant was capable of earning \$1,273.00 per week working at Harvesters.

Dr. Bailey reevaluated Claimant on June 3, 2025. Dr. Bailey did not review additional treatment records, but he took an updated history from Claimant and reviewed an MRI performed on April 15, 2025. Dr. Bailey interpreted the MRI as showing no significant changes compared to the prior MRI. Dr. Bailey identified no significant changes on physical examination. Dr. Bailey did not change his prior impairment ratings. Dr. Bailey noted Claimant was working regular duty at Harvesters, and he initially opined Claimant did not require permanent restrictions. Dr. Bailey later conceded during cross-examination an FCE would be indicated if Claimant had subjective complaints limiting his activities. Dr. Bailey also stated he was not opposed to Claimant's continued pain management treatment with Dr. Nicolae. Dr. Bailey did not provide a task loss opinion.

Mr. Benjamin evaluated Claimant on March 7, 2025, by telephone, and Mr. Benjamin later testified by deposition. Mr. Benjamin reviewed medical records from Dr. Bailey and Dr. Aks, as well as the regular hearing transcript. Mr. Benjamin noted Dr. Aks and Dr. Bailey gave opinions regarding restrictions, and he did not know if Dr. Nicolae imposed restrictions. Mr. Benjamin prepared a task list and provided a task loss opinion, despite not being a physician. Mr. Benjamin noted Claimant was earning \$1,273.16 working at Harvesters, which represented Claimant's earning capacity based on Dr. Aks's restrictions. Based on Dr. Bailey's opinions, Mr. Benjamin believed Claimant could earn \$1,792.81 per week.

On September 26, 2025, ALJ Brown issued the Review and Modification Order. Dr. Nicolae was designated the authorized treating physician. ALJ Brown found good cause existed to review and modify the prior award of permanent partial disability compensation because Respondent terminated Claimant, and Claimant sustained a change in earnings. After reviewing the ratings of Drs. Aks and Bailey, and citing a Board decision in the remand proceedings for *Johnson v. U.S. Food Service*,<sup>1</sup> ALJ Brown found the original award was inadequate, and modified Claimant's overall functional impairment to 10% of the body as a whole, including preexisting impairment. The Review and Modification Order does not explain the basis for the rating. ALJ Brown concluded Claimant was entitled to receive an award of permanent partial general disability compensation based on work disability considerations because his functional impairment met the 10% functional impairment threshold. ALJ Brown found Claimant's work disability was 42.25%, based on the 70% task loss opinion of Dr. Aks and 14.5% wage loss based on the average wage Claimant actually earned at Harvesters. The award of permanent partial disability compensation was modified accordingly. These proceedings follow.

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

Respondent argues the Review and Modification Order is erroneous because Claimant did not sustain a change in physical condition meriting modification of the prior functional impairment determination. According to Respondent, Claimant is not eligible to receive an award based on work disability considerations because he did not prove he either sustained functional impairment in excess of 7.5% of the body as a whole on account of the October 29, 2021, injury, or in excess of 10% of the body as a whole globally. Respondent also argues Claimant is not eligible to receive work disability because he is capable of earning comparable wages and did not sustain 10% loss in earning capacity. Claimant, however, argues the Review and Modification Order was decided correctly and should be affirmed.

Neither party disputes the provision in the Review and Modification Order designating Dr. Nicolae the authorized treating physician.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.<sup>2</sup> The provisions of the Workers Compensation Act shall be applied impartially to all parties.<sup>3</sup> The burden of proof shall be on the employee to establish the right to an

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<sup>1</sup> AP-00-0457-847, CS-00-0148-846, 2021 WL 6275017 (Kan. WCAB Dec. 30, 2021).

<sup>2</sup> See K.S.A. 44-501b(a).

<sup>3</sup> See *id.*

award of compensation, and to prove the various conditions on which the right to compensation depends.<sup>4</sup>

**1. THE DESIGNATION OF DR. NICOLAE AS THE AUTHORIZED TREATING PHYSICIAN IS AFFIRMED.**

At the hearing on Claimant's application for review and modification, Respondent objected to designating Dr. Nicolae the authorized treating physician because it asserted a right to select the authorized physician. The designation of Dr. Nicolae was not raised as an issue in Respondent's application for review, and was not briefed by the parties. At oral argument, the parties confirmed they do not dispute the designation of Dr. Nicolae as the authorized treating physician. Accordingly, the Board affirms the designation of Dr. Nicolae as the authorized treating physician.

**2. THE AWARD OF WORK DISABILITY COMPENSATION IS REVERSED AND VACATED, AND THE PRIOR AWARD OF PERMANENT PARTIAL DISABILITY BENEFITS BASED ON 7% FUNCTIONAL IMPAIRMENT OF THE BODY AS A WHOLE IS REINSTATED.**

The primary issue on review is whether the modification of the prior award of permanent partial disability based on functional impairment to an award based on work disability considerations is erroneous. In the Review and Modification Award, ALJ Brown found Claimant's termination and resulting wage loss constituted good cause to review the prior award. After reviewing the medical evidence, ALJ Brown found the original award was inadequate and Claimant's functional impairment was actually 10% of the body as a whole globally. After finding Claimant's functional impairment met the threshold for awarding work disability, and after finding Claimant's actual wage loss was 14.5%, ALJ Brown modified the original award to reflect 42.25% work disability.

Except for lump-sum settlements approved by the Division, any award or modification thereof may be reviewed by the administrative law judge for good cause. The administrative law judge shall hear all competent evidence offered, and if the administrative law judge finds the award has been obtained by fraud or undue influence, the award was made without authority or the result of serious misconduct, the award is excessive or inadequate, or the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify the award.<sup>5</sup> Any modification on the basis the functional impairment or work disability of the employee has increased or diminished shall be effective the date the increase or diminishment occurred, except the effective date shall

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<sup>4</sup> See K.S.A. 44-501b(c).

<sup>5</sup> See K.S.A. 44-528(a).

not be more than six months prior to the date the application for review and modification was filed.<sup>6</sup> Any modification of an award must act prospectively, and not retroactively.<sup>7</sup>

**A. CLAIMANT PROVED GOOD CAUSE TO REVIEW THE PRIOR AWARD OF COMPENSATION.**

In review and modification proceedings, the administrative law judge conducts a two-part analysis. First, the administrative law judge must determine whether good cause exists to review the original award, based on review of the evidence, because it is inadequate or the employee's impairment increased due to a change of circumstances. Merely pleading one of the grounds for modification in K.S.A. 44-528 is insufficient.<sup>8</sup> The Board previously ruled a post-award change in actual earnings constitutes good cause to review an award.<sup>9</sup>

It is undisputed Claimant was terminated by Respondent for unspecified reasons after the initial award was issued. As a result, Claimant experienced a reduction in his actual earnings, which continues to present. The Board finds and concludes Claimant proved good cause to review the original award of compensation.

**B. THE AWARD OF WORK DISABILITY BENEFITS MUST BE VACATED BECAUSE IT IS BASED ON CLAIMANT'S CONDITION AT THE TIME OF THE REGULAR HEARING, RATHER THAN A PROSPECTIVE CHANGE MERITING MODIFICATION.**

If the party seeking modification proves good cause, the administrative law judge must perform the second part of the analysis: to review the record and to modify if a change of circumstances exists rendering the original award inadequate or demonstrating an increase in functional impairment.<sup>10</sup> The purpose of review and modification proceedings is not to address claims which could have been raised during the litigation of the original award, or to raise arguments which could have been presented at the regular hearing, even

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<sup>6</sup> See K.S.A. 44-528(d).

<sup>7</sup> See *Acosta v. National Beef Packing Co., L.P.*, 273 Kan. 385, 394, 44 P.3d 330 (2002).

<sup>8</sup> See *Jackson v. Johnson County*, 64 Kan. App. 2d 345, 352, 551 P.3d 217 (2024).

<sup>9</sup> See *Cindric v. Sedgwick County*, AP-00-0486-472, CS-00-0469-583, 2025 WL 1606221 at \*3 (Kan. WCAB May 6, 2025).

<sup>10</sup> See *Jackson*, 64 Kan. App. 2d at 352.

if the allegation contains one of the bases for modifying under K.S.A. 44-528.<sup>11</sup> Again, any modification of an award must act prospectively, and not retroactively.

The Review and Modification Award is not premised solely on Claimant's wage loss. The award of work disability compensation in this matter is based on ALJ Brown's determination Claimant's global functional impairment is 10% of the body as a whole, which is one of the thresholds for awarding work disability.<sup>12</sup> To achieve this result, ALJ Brown revisited the nature and extent of Claimant's functional impairment based on Claimant's physical condition at the time of the original award. Dr. Aks did not believe Claimant's functional impairment changed. Dr. Aks testified Claimant's global 10% functional impairment was present when the original claim was litigated. Dr. Bailey did not change his opinions. The basis for Dr. Aks's preexisting impairment assessment was the MRI scan performed on November 22, 2021. Dr. Aks testified he did not rate Claimant's preexisting impairment during the litigation of the original claim because he was not asked to do so. Dr. Aks's opinions do not establish a prospective basis for modification of Claimant's underlying functional impairment. The determination Claimant's global impairment is 10% of the body as a whole is based on evidence which could have been produced at the original regular hearing.

The Review and Modification Award's reliance on *Johnson* is misplaced. In *Johnson*, the employee's application for review and modification was granted, and the matter was remanded for further proceedings, because the initial determination of the employee's functional impairment was based on an incorrect application of K.S.A. 44-510e. The subsequent review and modification proceedings involved consideration of competent medical evidence, which was not relevant when the original award in *Johnson* was issued. *Johnson* does not grant an administrative law judge license to relitigate nature and extent retroactively in review and modification proceedings.

Moreover, review of the entire record indicates Dr. Aks's opinion on Claimant's preexisting impairment is arguably contradictory. During the litigation of the original claim, Dr. Aks testified Claimant's prior low back injury resolved, and all of Claimant's symptoms were attributable to the injuries sustained on October 21, 2021. Dr. Aks testified the MRI scan revealed acute findings, as well as degenerative changes. Dr. Aks did not believe Claimant had preexisting lumbar facet syndrome or symptoms from degenerative change. Dr. Aks testified he did not apportion his rating for preexisting impairment. After Claimant was terminated and sought review and modification of the award, Dr. Aks testified Claimant had preexisting functional impairment based on the MRI scan he previously reviewed. This discrepancy undermines Dr. Aks's credibility. On the other hand, Dr. Bailey's testimony was

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<sup>11</sup> See *id.* at 354, 356.

<sup>12</sup> See K.S.A. 44-510e(a)(2)(C)(I).

consistent. The more credible evidence in the record does not support concluding Claimant’s functional impairment increased post-award, meriting modification.

Because Claimant did not prove his functional impairment increased to 10% of the body as a whole globally after the original award of compensation, Claimant did not prove eligibility for a work disability award. Claimant’s request for modification of the original award is denied, and the award of permanent partial disability compensation based on work disability considerations is vacated. The original award of permanent partial disability compensation based on 7% of the body as a whole is reinstated. In light of this ruling, it is unnecessary to address the balance of Respondent’s arguments regarding wage loss or task loss because they are moot.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board the Award issued by ALJ Brown, dated September 26, 2025, is affirmed in part and reversed in part. The designation of Dr. Nicolae as the authorized treating physician is affirmed. The award of permanent partial general disability compensation based on work disability considerations is reversed, and the request for review and modification is denied. The original award of permanent partial disability compensation based on 7% functional impairment to the body as a whole remains in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2026.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: (Via OSCAR)

Jeff K. Cooper  
John E. Ryan  
Hon. Brian Brown