

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

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|---------------------------------------|---|----------------------|
| RENEE D. ENGLAND |) | |
| Claimant |) | |
| |) | |
| VS. |) | |
| |) | |
| HWA DAVIS CONSTRUCTION |) | |
| Respondent |) | Docket No. 1,019,075 |
| |) | |
| AND |) | |
| |) | |
| COMMERCE AND INDUSTRY INS. CO. |) | |
| Insurance Carrier |) | |

ORDER

Respondent requested review of the September 10, 2008 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on December 3, 2008.

APPEARANCES

R. Todd King, of Wichita, Kansas, appeared for the claimant. John B. Rathmel, of Merriam, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant a 72.5 percent permanent partial disability¹ and a 30 percent whole body functional impairment² based on the opinions of Dr. Flutter. The ALJ also designated Dr. Flutter as the treating physician.

Respondent has appealed this Award and takes issue with nearly every finding made. Respondent alleges the ALJ erred in calculating the claimant's average weekly wage as well as the functional impairment and the permanent partial general (work) disability. Respondent also takes issue at the ALJ's decision to appoint Dr. Flutter as the treating physician for purposes of providing ongoing medical treatment and oversight of claimant's pharmaceutical needs.

Respondent maintains that claimant has sustained no task loss as a result of the accident at issue in this claim. Rather, claimant had an earlier injury that resulted in the same task loss that Dr. Flutter claims was attributable to her August 19, 2004 accident. Respondent also argues that claimant's average weekly wage was \$320 per week, far less than that found by the ALJ and as a result, her actual wage loss is 42 percent, leaving her with a 21 percent work disability. Respondent suggests that claimant's functional impairment is 20 percent, taking into account her pre-existing impairment and does not include any permanent impairment for claimant's shoulder. Respondent adds that while it does not dispute claimant's entitlement to future medical benefits, it disputes the ALJ's decision to designate Dr. Flutter as the treating physician. Respondent believes that it is entitled to designate claimant's treating physician.

Claimant argues that she is permanently and totally disabled. Alternatively, if claimant's recovery is limited to a work disability, she contends that her task loss is 76 percent and when averaged with a wage loss ranging from 67 percent to 100 percent, results in a work disability of 71.5 to 88 percent, depending on the findings with respect to claimant's task loss and wage loss.

Based on the parties' arguments, the Board must consider the following issues: 1) claimant's average weekly wage, 2) the nature and extent of claimant's impairment, and 3) whether the ALJ erred in designating Dr. Flutter as the designated treating physician.³

¹ This figure is an average of a 76 percent task loss and a 69 percent wage loss. The wage loss reflects and imputed wage of \$185.63 per week and a pre-injury average weekly wage of \$595.

² All functional impairment ratings are to the whole body unless otherwise indicated.

³ Respondent maintains claimant was overpaid temporary total disability benefits. Depending on the Board's conclusion with respect to average weekly wage, that may be accurate. Nonetheless, the actual amounts will be adjusted based upon the final award and any sums previously paid will be accounted for.

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 was hired by respondent as a laborer to help work on the construction of a bridge. Claimant testified that she was to work 10 hours per day, working 50-60 hours per week, taking only Sunday off. Any overtime was to be paid at time and a half according to claimant. She testified that she was earning \$8.00 per hour, although another employee on the same project was paid \$8.50 and claimant conceded that she may well have earned \$8.50 an hour.

Claimant's first day of work was Friday, August 13, 2004. On this day she worked 10 hours. Although claimant was somewhat unsure, the greater weight of evidence is that claimant worked 10 hours on Saturday, August 14, 2004. She did not work on Sunday the 15th, but she worked 10 hours each on Monday the 16th, Tuesday the 17th and Wednesday the 18th. This was her last full day of work.

Claimant suffered a compensable injury on August 19, 2004 when she fell from an unfinished bridge deck, falling approximately 12 feet, striking her shoulder on the way down. Claimant immediately felt pain in her neck and back and could not move. Her supervisor, David, came to her aid and helped her up, then took her to the doctor.

Claimant suffered a C5-6 fracture dislocation with spinal cord compression that required extensive treatment and surgery involving the installation of hardware and bone grafts. Claimant's treatment was ultimately referred to Dr. Fluter until March 7, 2006 when she was released with work restrictions but respondent was unable to accommodate those restrictions.

Dr. Fluter assigned a 25 percent impairment as a result of claimant's spinal injury and resulting fusion. And at her attorney's request claimant was evaluated by Karen Terrill for purposes of evaluating her vocational history and task analysis.

At the Regular Hearing on July 2, 2007, the claimant testified as to her injury and her present physical complaints. These included not only her neck and back, but her shoulder as well. And because claimant indicated that she had received no treatment for her shoulder injury, the Regular Hearing was continued and claimant was sent for further evaluation and if needed, treatment, for her shoulder complaints. Although she was examined, claimant elected not to proceed with any treatment for her shoulder. As a result, Dr. Fluter and Ms. Terrill were re-deposed with respect to her impairment and vocational capacity.

Dr. Fluter testified that claimant had additional impairment to her shoulder which when converted and combined, resulted in a total impairment rating of 30 percent. Dr. Fluter was also asked about an earlier injury claimant sustained and for which Dr. Fluter was involved in claimant's care. In 2003, claimant asserted a work-related injury arising out of her bilateral upper extremity complaints. A variety of physicians examined claimant and weighed in on her impairment. That claim was ultimately settled in January 2005 based upon a 9.5 percent whole person impairment, although there was no designation whether any of that impairment was attributable to the neck. At his deposition in the instant claim, Dr. Fluter testified that he had reviewed the records (having examined claimant in connection with that claim) and 5 percent was related to the neck for claimant's soft tissue complaints as a result of that earlier claim.⁴

And while some of the physicians that treated claimant for that injury imposed restrictions on her upper extremities, claimant returned to the workforce, obtaining her position as a laborer for this respondent. Thus, permanent partial general (work) disability was not an issue in that claim.

Dr. Fluter was also asked to speak to claimant's task loss based upon Ms. Terrill's task analysis. In October 2006, he recommended the following restrictions as a result of her fall from the bridge: limit lifting, carrying, pushing and pulling to 35 pounds occasionally and 15 pounds frequently, only occasional overhead activity and avoid holding her head and neck in an awkward or extreme positions. She is also to limit squatting, kneeling, crawling and stair and ladder climbing to occasional and avoid working at unprotected heights.⁵

In light of these restrictions, Dr. Fluter testified that based upon the restrictions he imposed as a result of the 2004 injury which is the focus here, claimant had lost the ability to perform 26 of the 34 non-duplicative tasks. When asked if claimant was able to do the heavy work she had done in the past, Dr. Fluter confirmed that claimant could not and that she did not appear to have the skills needed for light office work. He went on to testify that he believed claimant was not capable of substantial gainful employment. Although he confirmed that he released her to work light duty, working 8 hours a day. But if she was unable to find such a position, he agreed that she could work any job within the restrictions he imposed for as much as 4 hours a day, slowly increasing her hours up to 8 hours a day.⁶ He further indicated that it would be difficult if not impossible for her to perform her former jobs as a welder or a millwright and he even went so far as to say that she was "not capable of substantial gainful employment" given the fact that she has always performed

⁴ Fluter Depo. (June 11, 2008) at 50-51.

⁵ *Id.* at 22.

⁶ *Id.* at 44.

heavy labor type jobs and had no transferable skills or education to fall back upon.⁷ Ms. Terrill echoed this last opinion based upon her interview of claimant although she did not expressly testify that claimant was permanently and totally disabled. Rather, that claimant was capable of only a limited field of light employment that would earn her \$6.50 per hour.

Finally, Dr. Fluter anticipated claimant would need someone to monitor her medications because he believed claimant did “not [achieve] stellar results” from her fusion surgery and her need for pain medications would be constant.

At his July 11, 2007 deposition, Dr. Fluter was asked whether he imposed restrictions upon claimant’s work activities as a result of the previous accident. When he conceded that restrictions were imposed, he was then asked to indicate which of the claimant’s 34 tasks would have been prohibited by those earlier restrictions. Dr. Fluter testified that the same 26 tasks would have been prohibited. However, it is undisputed that claimant returned to heavy construction work, for this respondent, performing tasks that are prohibited by the restrictions that were imposed as a result of that earlier accident.

The ALJ first addressed claimant’s average weekly wage and accepted claimant’s testimony. He concluded claimant’s average weekly wage was \$595.00 based upon claimant’s statement that “she worked 60 hours a week at the rate of \$8.50 per hour”.⁸ He specifically noted that there was reference to a wage statement in the record but that none was ever offered.⁹ Thus, he concluded that claimant’s base wage was \$340.00 and she had 20 hours of overtime, yielding an average weekly wage of \$595.00.

While respondent concedes that no wage statement was ever offered into evidence, respondent maintains that there is sufficient evidence within the file to ascertain claimant’s base wage and that in no event was her wage the \$595.00 found by the ALJ.

It is uncontroverted that claimant believed she was expected to work as much as 6 days a week, 10 hours a day. Unfortunately, she did not work a full week before her injury. All told, she worked 50 hours¹⁰ (at most) before the day of her injury. These hours began on a Friday, with her injury occurring on the following Thursday. And while claimant originally testified that she was earning \$8.00 an hour, she agreed that if other laborers were paid \$8.50 she likely was as well.

⁷ *Id.* at 29-30.

⁸ ALJ Award (Sept. 10, 2008) at 2.

⁹ *Id.*

¹⁰ Claimant is unsure whether she worked on Saturday but upon further reflection, it appears from her testimony that she did work 10 hours on Saturday, August 14th.

K.S.A. 44-511(b)(4)(B) provides that the computation of the average gross weekly wage is determined by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked or was expected to work. In *Tovar*¹¹, it was stated:

If an employee is told that he is to keep Saturdays open and available for work, it appears to us that this is tantamount to a directive that he is expected to work each Saturday. Whether he does or not is largely irrelevant because the statute bases compensation on the number of days per week an employee is “expected” to work, not the number of days an employee is guaranteed to work or actually does work.

Here, claimant testified that she was expected to work 50-60 hours per week, working 10 hour days. Unfortunately she did not work a full week but it would appear, at least from her testimony, that her expectations were accurate. She worked 50 hours over 6 days. On the 7th day she was injured. Given her testimony and the lack of any documents or testimony to contradict her recitation of the facts, the Board finds that claimant’s base wage was \$340.00 (\$8.50 an hour, 40 hours per week) with her actual overtime of 10 hours - \$127.50 per week, yielding a gross average weekly wage of \$467.50. There is no statutory authority to extrapolate overtime when calculating average weekly wage. The Award is hereby modified to reflect an average weekly wage of \$467.50.

Turning now to the nature and extent of claimant’s impairment, the ALJ awarded claimant 30 percent permanent partial impairment based on Dr. Fluter’s testimony, as he was the only physician who testified in this case. This 30 percent is comprised of 25 percent to the neck (for the fusion) and an additional 5 percent for the shoulder injury (after converting the shoulder impairment). Like the ALJ, the Board is persuaded by Dr. Fluter’s opinions, if only because his is the only opinion contained within the file. Thus, the 30 percent permanent partial impairment to the whole body is affirmed.

The ALJ did not address the respondent’s contention that claimant had a preexisting impairment. The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the later injury is an aggravation of a preexisting condition. The Act reads, in part:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. **Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.**¹² (Emphasis added).

¹¹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

¹² K.S.A. 44-501(c).

Dr. Flutter, not only treated claimant in this claim, but for her earlier injury as well. During his deposition he was specifically asked if claimant had a preexisting impairment as a result of her earlier injury. He responded in the affirmative and assigned a 5 percent to the neck. Based upon this uncontroverted testimony, the Board finds the respondent is entitled to a reduction of the claimant's permanent impairment, leaving a net impairment of 25 percent. The Award is modified to reflect this overall net impairment of 25 percent.

Claimant contends that she is permanently and totally disabled. Indeed, claimant's actual post-injury wage loss is 100 percent as she has yet to find long term employment. Although claimant did find part-time work at a convenience store, that job only lasted 3 weeks. Claimant testified she quit that job because she was unable to maintain that employment because of her migraines and the employer's inability to give her more frequent breaks. The evidence suggests that while claimant has shown some ability to work, those efforts are hampered by her migraine headaches and the amount of medications necessary to address that symptom and her resulting pain. The best she has been able to do is part-time employment.

The ALJ found that claimant was capable of working and thus had a capacity to earn \$185.63 per week. The Board has considered the entire record and finds that claimant's job prospects are not bright given her restrictions, her inability to work full-time, her medications and her ongoing complaints of pain. Nonetheless, she has worked and Ms. Terrill testified that claimant retained the capacity to earn \$6.50 an hour, a sum that is not inconsistent with claimant's actual work experience post-injury. If the Board were to find this wage, \$6.50 an hour, 27 hours per week, was representative of claimant's actual capacity post-injury, the Board has serious concern that such a wage would constitute substantial gainful employment.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the

facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.¹³

In *Wardlow*¹⁴, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

Here, claimant has precious few transferable skills. She has a history of physical labor, including as a millwright and welder. She cannot return to those jobs and she has no office skills. She continues to take medications. Even if she were to obtain employment, the best she can expect is \$6.50-\$6.75 an hour and even then, her ongoing physical complaints make her a less than optimum employee as she frequently has migraines that prevent her from working. All told, \$184.50 per week is not a livable wage. After considering the constellation of facts the Board finds that claimant is permanently and totally disabled. The ALJ's Award is hereby modified to reflect this finding. As a result, there is no need to address the claimant's arguments regarding work disability under K.S.A. 44-510e(a).

While respondent takes issue with the ALJ's decision to designate Dr. Fluter as the treating physician, the Board finds this decision is warranted, given the medications claimant is presently being prescribed, and in light of Dr. Fluter's testimony. Dr. Fluter is, after all, the physician who was treating claimant and is the most familiar with her condition.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated September 10, 2008, is affirmed in part and modified in part as follows:

The claimant is entitled to 114.51 weeks temporary total disability compensation at the rate of \$311.68 per week or \$35,690.48 followed by permanent total disability compensation at the rate of \$311.68 per week not to exceed \$125,000.00 for a permanent total general body disability.

¹³ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

¹⁴ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

As of January 26, 2009 there would be due and owing to the claimant 114.51 weeks of temporary total disability compensation at the rate of \$311.68 per week in the sum of \$35,690.48 plus 117.06 weeks of permanent total disability compensation at the rate of \$311.68 per week in the sum of \$36,485.26 for a total due and owing of \$72,175.74, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$52,824.26 shall be paid at \$311.68 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of January 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
John B. Rathmel, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge