BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GARY F. JUETT	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket Nos. 241,926
	)	1,034,321
	)	1,042,037
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the October 25, 2011 Post Medical Award and Review and Modification Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on December 13, 2011.

APPEARANCES

James E. Martin, of Overland Park, Kansas, appeared for the claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the post-award order. The parties acknowledged that claimant has a 50 percent permanent partial general (work) disability based upon a 100 percent wage loss and a 0 percent task loss.

ISSUES

The Administrative Law Judge denied claimant's request for post-award medical benefits in docket nos. 241,926 and 1,034,321, finding that the "record failed to show by

a preponderance of the evidence that there is additional medical treatment likely to benefit the claimant".[1] The parties acknowledged at oral argument to the Board that the issues dealing with the claimant's requests for post-award medical benefits in docket nos. 241,926 and 1,034,321 are not before the Board at this time. Therefore, those findings by the ALJ remain in full force and effect.

The ALJ modified the award in docket no. 1,042,037 to reflect an increase in claimant's permanent partial general (work) disability. The claimant requests review of whether the ALJ erred in limiting claimant to 149.5 weeks of work disability. Claimant argues that the ALJ incorrectly calculated the award of work disability in docket no. 1,042,037.

Respondent argues that the Award should be affirmed.

FINDINGS OF FACT

The facts are not in dispute in this matter. The parties acknowledged that claimant has a 100 percent wage loss and there is no task loss opinion in this record. Therefore, a 50 percent permanent partial general (work) disability is appropriate under K.S.A. 44-510e. The dispute centers around the method used by the ALJ to calculate the review and modification award. The parties agreed that claimant has been paid $14,272.42 in permanent partial disability compensation. Both parties agreed in their briefs to the ALJ and the Board that claimant's award should be sufficient to qualify for the maximum award of $100,000.00 under K.S.A. 44-510f.

The ALJ, in calculating the award, determined that the period from claimant's date of accident through October 1, 2010, the last date claimant earned wages with respondent, i.e. the date of his layoff, was to be disregarded for the purposes of calculating the award. He then determined that the remaining 299 weeks, from the October 1, 2010 date of the layoff through the end of the 415 week time limit set forth in K.S.A. 44-510e would be multiplied by the 50 percent work disability, leaving 149.5 weeks of permanent partial disability compensation due at the rate of $529 per week. This calculates to an award of $79,085.50. When added to the $14,272.42 already paid, the total award would be $93,357.92.

Respondent argues that the calculation method utilized by the ALJ is correct. Claimant contends that the calculation method is contrary to the method utilized by the Board in its 18 years of calculations. Claimant argues that the proper method would be to calculate the 50 percent work disability, and then give respondent credit for the weeks paid under the original award. With a 50 percent work disability award, claimant would be

[1] ALJ Award (Oct. 25, 2011) at 3.

entitled to 207.5 weeks of benefits, up to the $100,000.00 maximum allowed under K.S.A. 44-510f. Respondent would then be entitled to credit for the amount already paid, leaving $85,727.58 due, to be paid over the remaining life of the award.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

K.S.A. 44-510e states in part:

> (a) If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a

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[2] K.S.A. 44-501 and K.S.A. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination. The amount of weekly compensation for permanent partial general disability shall be determined as follows:
>
> (1) Find the payment rate which shall be the lesser of (A) the amount determined by multiplying the average gross weekly wage of the worker prior to such injury by 66 2/3% or (B) the maximum provided in K.S.A. 44-510c and amendments thereto;
>
> (2) find the number of disability weeks payable by subtracting from 415 weeks the total number of weeks of temporary total disability compensation was paid, excluding the first 15 weeks of temporary total disability compensation that was paid, and multiplying the remainder by the percentage of permanent partial general disability as determined under this subsection (a); and
>
> (3) multiply the number of disability weeks determined in paragraph (2) of this subsection (a) by the payment rate determined in paragraph (1) of this subsection (a).
>
> The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

K.S.A. 44-528, the review and modification statute, allows for a modification of an award 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 . . . .[4]

The method utilized by the Board since the creation of the new method of awarding benefits in 1993 has been reviewed by the Appellate Courts in Kansas and found to be a proper way of calculating an award under the revised method created in 1993.[5] The Board sees no justification in changing that calculation method.[6]

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified and the method used to calculate the award will follow that previously and consistently utilized by the Board.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated October 25, 2011, is modified as follows:

Effective October 1, 2010, claimant is awarded a 50 percent permanent partial general disability based upon a 100 percent wage loss and a 0 percent task loss under K.S.A. 44-510e. Credit is given for the $14,272.42 in permanent benefits already paid (26.98 weeks at $529.00 per week). As a 50 percent permanent partial general disability award will exceed the $100,000.00 maximum set forth in K.S.A. 44-510f, respondent will owe an additional 162.06 weeks of benefits totaling $85,727.58 at the weekly rate of $529.

As of the date of this award, there is due and owing claimant 89.98 weeks of permanent partial disability compensation at the rate of $529 per week in the sum of $47,599.42 for a total of $47,599.42 (this includes the $14,272.42 discussed above), which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $52,400.58 is to be paid for 99.06 weeks at the rate of $529 per week, until fully paid or further order of the Director.

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[4] K.S.A. 44-528(a).

[5] *Wheeler v. Boeing Co.*, 25 Kan. App. 2d 632, 967 P.2d 1085 (1998); *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[6] For a full description of the Board's calculation method see: *Deist v. Dillon Companies, Inc.*, No. 213,485, 1999 WL 1314825 (Kan. WCAB Dec. 30, 1999).

IT IS SO ORDERED.

Dated this _____ day of January, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge