

rating. But the ALJ denied claimant's request for additional weeks of temporary total disability compensation.

Claimant requests review of whether he is entitled to additional weeks of temporary total disability compensation, the nature and extent of disability, and whether in the computation of the award the weeks of temporary total disability compensation should be deducted from the number of weeks allowed for loss of use of the scheduled member.

Claimant argues he is entitled to temporary total disability compensation from July 17, 2007, the date of the accident, through October 8, 2007, when claimant was released to full-duty work. Claimant further argues the evidence supports a finding of a percentage of disability to the lower leg in a range from 10 percent to 25 percent. Finally, claimant argues that, although K.A.R. 51-7-8 directs that the number of weeks paid for temporary total disability are deducted from the number of weeks allowed for loss of use of the scheduled member before that number is multiplied by the percentage of disability, K.S.A. 44-510d specifically provides for an award of permanent partial disability after the period of temporary total disability without direction to deduct the weeks paid for temporary total disability compensation. Consequently, claimant requests the Board to calculate the award without any deduction for the weeks of temporary total disability compensation.

Respondent argues the ALJ's Award should be affirmed with regard to the denial of additional weeks of temporary total disability compensation and the method used to calculate the award but modified to provide for a 0 percent impairment to the lower leg.

The issues for Board determination include the nature and extent of disability, the number of weeks of temporary total disability compensation claimant is entitled to receive and whether, in the calculation of the award, the weeks of temporary total disability compensation should be deducted as provided by K.A.R. 51-7-8.

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:

It is undisputed that on July 17, 2007, claimant stepped on a hose at work and tripped and fell. After the injury he was taken to a break room where an ice pack was applied to his foot and ankle. Claimant was then referred to OHS-COMPCARE where he was x-rayed and provided Ibuprofen. Apparently, the x-rays were negative. Claimant was told that in a couple of days he could return to light-duty work and was provided restrictions which included a 10-pound lifting limit and the requirement that he stand 50 percent of the time and sit 50 percent of the time. Claimant was also referred to therapy three times a week. Claimant testified that although he continued to complain of pain he was not prescribed pain medication.

Because OHS-Compcare restricted claimant to light-duty work respondent provided claimant with work stuffing envelopes but because of his continued foot pain claimant only worked approximately six hours over a two-day time period.

Claimant complained to Kathy Dotson, respondent's management services supervisor, that he wanted a second opinion because every time he complained of his foot pain he was not even provided pain medication. Ms. Dotson told claimant he could obtain a second opinion but that respondent would not pay for it.

Claimant, a diabetic, went to a regularly scheduled check-up for that condition with his personal physician. She sent him for x-rays for his foot which was still swollen. Those x-rays revealed claimant had suffered a calcaneal avulsion fracture. Claimant was rechecked at OHS-Compcare, placed in a CAM walker and provided crutches. Respondent then referred claimant to Dr. Thomas S. Samuelson.

Dr. Samuelson first saw claimant on August 17, 2007. Dr. Samuelson diagnosed claimant with a calcaneal avulsion fracture which he described as when a ligament structure pulls a piece of bone from the calcaneus. Treatment consisted of conservative measures and claimant was continued in a walking boot using crutches but was told to put weight on his leg as tolerated. Claimant was restricted to sit down work. On October 8, 2007, Dr. Samuelson released claimant to full-duty work.

Dr. Samuelson testified that the type of fracture that claimant suffered does not lead to any impairment and he opined claimant did not suffer any permanent impairment. But on cross-examination the doctor agreed claimant's measured dorsiflexion would be considered a mild deficit and rated at 7 percent to the lower extremity. And his eversion would rate 5 percent and his inversion 5 percent. But the doctor concluded that he thought those conditions would improve with time and therefore claimant would suffer no permanent impairment.

At the request of claimant's attorney, Dr. Edward J. Prostic examined claimant on January 15, 2008, for a permanent partial impairment evaluation. Dr. Prostic diagnosed claimant with a healed fracture of the anterior process of the calcaneus and possibly an osteochondral fracture. Dr. Prostic had x-rays taken but could not confirm that claimant had an osteochondral fracture. Dr. Prostic's examination revealed atrophy in claimant's right calf. Based upon the *AMA Guides*¹, Dr. Prostic rated the claimant with an 8 percent impairment for the atrophy and an additional impairment for the unspecified intra-articular injury. Dr. Prostic ultimately concluded claimant suffered a 10 percent impairment to the lower leg.

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Temporary Total Disability Compensation

The claimant argues that he is entitled to temporary total disability compensation from the date of accident through October 8, 2007, when he was released to full-duty work. The ALJ denied temporary total disability compensation after August 3, 2007, finding respondent had work available within his restrictions.

It must be noted that claimant was receiving treatment from OHS-Compcare and was restricted to light duty when the offer of accommodated work within his restrictions was made. It must be further noted that his condition had not been accurately diagnosed and his continued pain complaints were essentially ignored. A potential job with Harley-Davidson was offered to claimant on August 3, 2007. Claimant testified that he was in physical therapy when the offer was made. Claimant testified:

Q. Well, Kathy testified -- do you remember when she was at the hearing -- she testified that she called you and offered you a job at the Harley-Davidson plant. Do you remember that?

A. Yes.

Q. Did you speak to her about a job at the Harley-Davidson plant?

A. Not at that time. What happened was, the day Kathy called me, I was in therapy. She called me that morning. I was in therapy. Because I go to therapy in the morning. When I got out of therapy, I called Kathy back. And I said, "Kathy, this is Steve Gordon. I'm calling regarding the Harley-Davidson job."

Because she didn't answer when I called her back. I got her voice mail. [sic] And I said, "Please give me a call back."

The reason why I didn't just tell her, yes, I will accept the job because I needed to discuss with her about my therapy. You're sending me over to this job. Do I get to leave to go to therapy? That's why I said call me back. When she called me back, she told me the job had been filled.²

There was a second sedentary job offer but claimant explained that he had just changed medication for his diabetes and needed to wait to see the effects of that medication before accepting the second job. And when he later called back he was told there was nothing available. Claimant testified that he continued to call about work but respondent made no further job offers.

Again, at the time the two accommodated job offers were made to claimant he was still attending physical therapy and the fracture in his foot had not been diagnosed nor was

² R.H. Trans. at 11-12.

he being provided pain medication. Claimant's request for information regarding whether he would be allowed to continue to attend physical therapy if he went to the Harley-Davidson job was reasonable but that information was not provided. Likewise, his request to delay taking the other job due to his foot pain as well as his change in medicine for his diabetes was also reasonable. On August 15, 2007, when claimant was ready to return to accommodated work, no further job offers were extended. The Board finds that claimant was not capable of performing the accommodated jobs offered on August 3, 2007. Consequently, the Board finds claimant has met his burden of proof to establish that he is entitled to temporary total disability compensation from July 17, 2007 through October 8, 2007.

Nature and Extent of Disability

K.S.A. 44-510d(a)(23) provides:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.³ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.⁴

Dr. Samuelson opined that claimant did not suffer any permanent impairment as a result of his work-related injury. Dr. Prostic opined that claimant suffered a 10 percent permanent partial impairment to his lower leg. The ALJ analyzed the doctors opinions in the following fashion:

Dr. Samuelson's rating was based on how the doctor expected the claimant to fare in the future rather than his condition at the time of the examination. Samuelson's rating was speculative or premature. Dr. Prostic's rating for atrophy was based on the claimant's present physical condition. His rating for an unspecified intra-articular injury was based on a section of the *Guides* devoted to a different type of injury that

³ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁴ *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

the claimant did not have. The credible medical testimony proved a permanent impairment of 8% to the lower leg, 190 week level.⁵

The Board agrees and affirms.

Calculation of Scheduled Disability Award

When computing the weeks of permanent partial disability benefits an injured worker is entitled to receive for an injury listed in the schedule of K.S.A. 44-510d, are the weeks of temporary total disability benefits deducted from the number of weeks provided in the schedule of K.S.A. 44-510d?

K.A.R. 51-7-8 provides that the number of weeks paid for temporary total disability are deducted from the number of weeks allowed for loss of use of the scheduled member before that number is multiplied by the percentage of disability. Claimant argues that K.A.R. 51-7-8 is void because it conflicts with K.S.A. 44-510d. Claimant further argues that K.S.A. 44-510d specifically provides for an award of permanent partial disability after the period of temporary total disability without direction to deduct the weeks paid for temporary total disability compensation. Consequently, claimant requests the Board to determine the regulation is void as it violates the statute.

Claimant points out that K.S.A. 44-510e provides for calculation of an award for a whole person permanent partial disability and specifically mandates deduction for temporary total disability compensation. Likewise, K.S.A. 44-510f(a)(1) provides that the maximum compensation paid for an award for permanent total disability includes any payments of temporary total disability compensation. But, K.S.A. 44-510d which provides for scheduled disabilities does not specifically mandate deduction of the temporary total disability compensation and instead simply states "compensation shall be paid for temporary total loss of use and as provided in the following schedule." K.S.A. 44-510d does not mandate deduction of the temporary total disability compensation but instead uses the conjunctive "and" to indicate compensation shall be paid for temporary total and then as provided in the schedule for the particular scheduled member.

The claimant's argument is compelling but the Board must first determine if it has jurisdiction to grant claimant the relief requested. Stated another way, can the Board determine that a duly promulgated regulation is void?

There is no question the Director of Workers Compensation may adopt the rules and regulations that are necessary for administering the Workers Compensation Act. The Act provides:

⁵ ALJ Award (Aug. 27, 2008) at 4.

The director of workers compensation may adopt and promulgate such rules and regulations as the director deems necessary for the purposes of administering and enforcing the provisions of the workers compensation act. . . . All such rules and regulations shall be filed in the office of the secretary of state as provided by article 4 of chapter 77 of the Kansas Statutes Annotated and amendments thereto.⁶

And administrative regulations that are adopted pursuant to statutory authority for the purpose of carrying out the declared legislative policy have the force and effect of law.⁷ Administrative agencies are generally required to follow their own regulations and failure to do so results in an unlawful action.⁸

Moreover, the Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold that an Act of the Kansas Legislature is unconstitutional. Stated another way, the Board is not a court of proper jurisdiction to decide the constitutionality of laws in the State of Kansas. Because a regulation has the force and effect of law, such a regulation is as binding on the administrative agency as if it was a statute enacted by the legislature. Consequently, the Board concludes that it does not have jurisdiction and authority to determine that a regulation is void.

The Board does have jurisdiction to interpret and apply both laws and regulations. K.S.A. 44-510d does not address how temporary total disability benefits figure into the computation of an award for a scheduled disability. Indeed, the Act is silent. Consequently, K.A.R. 51-7-8 was adopted and it provides:

(a)(1) If a worker suffers a loss to a member and, in addition, suffers other injuries contributing to the temporary total disability, compensation for the temporary total disability shall not be deductible from the scheduled amount for those weeks of temporary total disability attributable to the other injuries.

(2) The weekly compensation rate for temporary total compensation shall be computed by multiplying .6667 times the worker's gross average weekly wage. This figure shall be subject to the statutory maximum set in K.S.A. 44-510c.

(b) If a healing period of 10% of the schedule or partial schedule is granted, not exceeding 15 weeks, it shall be added to the weeks on the schedule or partial schedule before the following computations are made.

(1) If a loss of use occurs to a scheduled member of the body, compensation shall be computed as follows:

(A) deduct the number of weeks of temporary total compensation from the schedule;

⁶ K.S.A. 44-573.

⁷ See K.S.A. 77-425; *Harder v. Kansas Comm'n on Civil Rights*, 225 Kan. 556, Syl. ¶ 1, 592 P.2d 456 (1979); *Vandever v. Kansas Dept. of Revenue*, 243 Kan. 693, Syl. ¶ 1, 763 P.2d 317 (1988).

⁸ *Vandever*, 243 Kan. 693, Syl. ¶ 2.

(B) multiply the difference by the percent of loss or use to the member; and
(C) multiply the result by the applicable weekly temporary total compensation rate.

(2) If part of a finger, thumb, or toe is amputated, compensation shall be calculated as follows:

(A) multiply the percent of loss, as governed by K.S.A. 1996 Supp. 44-510d, as amended, by the number of weeks on the full schedule for that member;

(B) deduct the temporary total compensation; and

(C) multiply the remainder by the weekly temporary total compensation rate.

(3) If a scheduled member other than a part of a finger, thumb, or toe is amputated, compensation shall be computed by multiplying the number of weeks on the schedule by the worker's weekly temporary total compensation rate. The temporary total compensation previously paid shall be deducted from the total amount allowed for the member.

(c)(1) An injury involving the metacarpals shall be considered an injury to the hand. An injury involving the metatarsals shall be considered an injury to the foot.

(2) If the injury results in loss of use of one or more fingers and also a loss of use of the hand, the compensation payable for the injury shall be on the schedule for the hand. Any percentage of permanent partial loss of use of the hand shall be at least sufficient to equal the compensation payable for the injuries to the finger or fingers alone.

(3) An injury involving the hip joint shall be computed on the basis of a disability to the body as a whole.

(4) An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.

(5) If the tip of a finger, thumb, or toe is amputated, the amputation does not go through the bone, and it is determined that a disability exists, the disability rating shall be based on a computation of a partial loss of use of the entire finger. (Authorized by K.S.A. 1996 Supp. 44-510d and K.S.A. 44-573; implementing K.S.A. 1996 Supp. 44-510d; effective Jan. 1, 1966; amended Jan. 1, 1971; amended Jan. 1, 1973; amended, E-74-31, July 1, 1974; amended May 1, 1975; amended Feb. 15, 1977; amended May 1, 1978; amended May 1, 1983; amended, T-88-20, July 1, 1987; amended May 1, 1988; amended May 22, 1998.)

Although the regulation is somewhat lacking in clarity, it does indicate that the weeks of temporary total disability benefits are to be deducted from the maximum number of weeks provided in the schedule before multiplying by the functional impairment rating to obtain the number of weeks of permanent disability benefits due the injured worker. Accordingly, until an appellate court determines that the Board has jurisdiction to determine whether a regulation contradicts the statute and declare a regulation void, the Board will continue to apply K.A.R. 51-7-8 in the calculation of awards for scheduled injuries.

Consequently, claimant's award of permanent partial disability benefits must be computed after reducing the maximum weeks by the temporary total disability weeks. The claimant was entitled to 11.86 weeks of temporary total disability compensation.

Accordingly, the temporary total disability weeks will be deducted from the calculation of benefits for the scheduled injury to the lower leg.

The Board notes that the ALJ did not award claimant’s counsel a fee for his services. The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant’s counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated August 27, 2008, is modified to reflect claimant is entitled to temporary total disability compensation from July 17, 2007 through October 8, 2007, and affirmed in all other respects.

Claimant is entitled to 11.86 weeks of temporary total disability compensation at the rate of \$266.68 per week in the amount of \$3,162.82 followed by 14.25 weeks of permanent partial disability compensation, at the rate of \$266.68 per week, in the amount of \$3,800.19 for a 8 percent loss of use of the right lower leg, making a total award of \$6,963.01, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this 27th day of February 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Mark E. Kolich, Attorney for Claimant
- Elizabeth Dotson, Attorney for Respondent and its Insurance Carrier
- Kenneth J. Hursh, Administrative Law Judge