

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

GRAYSON JEAN-PIERRE)	
Claimant)	
)	
VS.)	
)	
TEMPLE-INLAND, INC.)	
Respondent)	Docket No. 1,036,662
)	
AND)	
)	
INSURANCE CO. OF STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the December 16, 2009, Award entered by Administrative Law Judge Steven J. Howard. The Board heard oral argument on March 24, 2010. Kathleen A. McNamara, of Kansas City, Missouri, appeared for claimant. Gary R. Terrill and Ryan Wetz, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant sustained an accidental injury arising out of and in the course of his employment on August 24, 2007; that claimant was entitled to temporary total disability benefits from August 25, 2007, through April 7, 2008; that claimant was entitled to be reimbursed for medical expenses incurred and that claimant's health and accident provider is entitled to reimbursement from respondent pursuant to its lien; that claimant is entitled to medical mileage as requested; and that claimant did not have a preexisting impairment and respondent is not entitled to a credit pursuant to K.S.A. 2009 Supp. 44-501(c). The ALJ found that claimant suffered a 31 percent task loss associated with his accidental injury. From April 21, 2008,¹ to June 2,

¹ Dr. Pratt's report dated April 21, 2008, indicates that he last saw claimant on April 1, 2008, and that claimant was at maximum medical improvement on that date.

2008, claimant had a 100 percent wage loss, which, with the 31 percent task loss, computed to a 65.5 work disability; from June 3, 2008, through March 17, 2009, claimant had a 73.5 percent wage loss, which, with the 31 percent task loss, computed to a 52.25 percent work disability; from March 18, 2009, until July 15, 2009, claimant had a 79.6 percent wage loss, which, with the 31 percent task loss, computed to a 55.3 percent work disability; and commencing July 16, 2009, forward, claimant had a 73.5 percent wage loss, which, with the 31 percent task loss, computed to a 52.25 percent work disability.

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

ISSUES

Respondent contends that claimant did not suffer an accidental injury that arose out of and in the course of his employment but, instead, claimant's preexisting degenerative lumbar condition simply became symptomatic while he was at work. In the event the Board finds claimant suffered a compensable injury, respondent argues that claimant is not entitled to a work disability because he turned down an accommodated offer of employment in which he would have earned a wage that was 91.6 percent of his preinjury average weekly wage. Respondent further argues that claimant's alleged permanent partial disability was not caused by a change in his physical condition but was because claimant moved away from the area to be with his children. If the Board finds that claimant is entitled to a work disability, respondent contends that Dr. Pratt's opinion on claimant's task loss is the most credible. If the Board finds that claimant suffered a compensable injury but is not entitled to a work disability, respondent argues that Dr. Pratt's rating of claimant's functional impairment of 5 percent is the most credible.

Respondent further argues that claimant has failed to demonstrate any unreasonable failure on its part to provide him with treatment, failed to show there was a medical emergency sufficient for him to receive treatment without first having secured the approval of respondent, and failed to prove his ambulance bill and treatment at KUMC was related to his alleged accidental injury at work. Respondent also contends that claimant knew Concentra was his authorized treating medical provider and took no steps to seek a change of physician to Dr. Craig Barbieri or St. Joseph Medical Center. Therefore, respondent asks that the Board find claimant's outstanding medical bills and the lien submitted by claimant's personal health insurance provider are not its responsibility or, at most, respondent should be responsible for only the first \$500 as unauthorized medical.

Issues raised by respondent in its application for review but not briefed were claimant's request for additional temporary total disability benefits, future medical, medical mileage, and its request for a credit pursuant to K.S.A. 44-510(c). During oral argument to the Board, respondent clarified that these issues were tied to the overall compensability of the claim and the credit issue was also part of the causation argument pertaining to the

claim for work disability rather than a claim for a credit for preexisting impairment of function.

Claimant asks the Board to affirm the ALJ's Award in its entirety. Claimant argues that he met his burden of proving he sustained an injury that arose out of and in the course of his employment, that he was entitled to a work disability, and that he was entitled to payment of or reimbursement for his outstanding medical bills and his medical mileage, as well as reimbursement for his personal health insurance carrier for its payment of medical bills he incurred as a result of his work-related injury. Further, claimant contends he is entitled to additional temporary total disability benefits from the date of accident to April 7, 2008, as well as future medical. Finally, claimant contends respondent is not entitled to a credit for pursuant to K.S.A. 44-510(c).

The issues for the Board's review are:

(1) Did claimant sustain an accidental injury that arose out of and in the course of his employment with respondent?

(2) If so, what is the nature and extent of claimant's disability?

(3) Is respondent responsible for the payment of claimant's outstanding medical bills and reimbursement to claimant's personal health insurance provider for its lien? If not, is claimant entitled to unauthorized medical compensation? Is claimant entitled to reimbursement for his medical mileage?

(4) Is respondent entitled to a credit pursuant to K.S.A. 2009 Supp. 44-501(c) for claimant's preexisting impairment?

(5) Is claimant entitled to future medical compensation?

(6) Is claimant entitled to additional temporary total disability benefits?

FINDINGS OF FACT

Claimant worked for respondent as a machine operator, which required him to load a machine with stacks of cardboard that weighed from 50 to 60 pounds. In doing so, he had to twist, turn and bend on average every 15 seconds. He would work constantly in four-hour increments before getting a break. On August 24, 2007, claimant was making a heavy, difficult box. Claimant was feeding cardboard into the machine, and while lifting he felt a pop in his back. Although his back was sore, he continued to work his shift.

When claimant woke up the next morning, he could not move, so he called in to work. On Monday, August 27, he made several calls to respondent to report his injury, leaving messages, but no one returned his calls. He then, on his own, went to the

emergency room at St. Joseph Medical Center (St. Joseph) for treatment. While he was at the emergency room at St. Joseph, he was contacted by someone at respondent telling him to instead go to Concentra. Claimant completed his treatment at the emergency room and then went to Concentra. While he was at Concentra, his pain was so excruciating that he passed out. When he woke up, he was at the emergency room at the Kansas University Medical Center (KUMC). He underwent some tests at KUMC and was discharged.

Claimant testified that he understood that Concentra was authorized to treat his injury, and he went back to Concentra once or twice after August 27. The physician at Concentra released him from treatment, saying that claimant's problem was not work related. The physician advised claimant to follow up with his personal doctor. Claimant said the physician at Concentra did not do an MRI² and "had nothing to go with and my body was aching, so I needed help."³ Claimant, therefore, on his own, received treatment from Dr. Craig Barbieri, Dr. Norbert Brown, and St. Joseph. Dr. Terrence Pratt was eventually authorized by respondent to treat claimant. He first saw claimant on October 25, 2007. Claimant continued to also see Dr. Barbieri during the same period of time he was being treated by Dr. Pratt.

Claimant started receiving temporary total disability benefits on September 27, 2007. He is requesting temporary total disability benefits from the date of injury until April 7, 2008. He testified that because of his injury, he had been taken off work by Dr. Barbieri.

Claimant denied having previous problems with his low back but admitted having regular chiropractic adjustments. Claimant has had chiropractic treatments all his life. He believes chiropractic treatment is a way of natural health. He said he had no major previous problems with his back. He had not had an MRI, had no previous pain going down his legs, and had not previously been diagnosed with a bulging disk.

Dr. Terrence Pratt is board certified in physical medicine and rehabilitation and is a board certified independent medical examiner. When he initially assessed claimant on October 25, 2007, claimant complained of low back pain. He had previously had a course of physical therapy, had undergone a series of epidural injections, and had restrictions. Dr. Pratt agreed that the treatment claimant received prior to his seeing him was reasonable. Dr. Pratt recommended more physical therapy, which was approved by respondent, as well as work conditioning therapy and a TENS unit. Dr. Pratt noted that his medical records contained a progress note from Outpatient Rehabilitation & Sports

² Claimant had an MRI on September 5, 2007, that showed he had mild to moderate left lateral recessed stenosis at L4-L5. It is unclear which physician ordered the MRI.

³ R.H. Trans. at 33.

Medicine Center dated November 28, 2007, directed to Dr. Barbieri. Dr. Pratt testified he did not know whether he had ordered this therapy or if it had been ordered by Dr. Barbieri. Nevertheless, he testified that no matter who ordered it, the treatment was due to claimant's injury and was a reasonable course of treatment.⁴ Claimant showed improvements with his conservative treatment. Dr. Pratt's final evaluation of claimant was on April 1, 2008, at which time he found claimant to be at maximum medical improvement (MMI). He released claimant from treatment with restrictions not to lift in excess of 45 pounds occasionally as well as no frequent low back bending or twisting. Dr. Pratt's final diagnosis was low back pain with degenerative changes at L4-L5. He said claimant needed to do home exercises and maintain a routine at home to keep his back in shape. Dr. Pratt said claimant needed to use his TENS unit if it provided relief. Dr. Pratt said it was possible that claimant would need more treatment in the future to help him cure and relieve the effects of his injury. Dr. Pratt said the reason for claimant's back pain was his actions in loading his machine at work.

Using the *AMA Guides*,⁵ Dr. Pratt rated claimant as having a 5 percent permanent partial impairment to the whole body as a result of his work-related accident. Dr. Pratt reviewed the task list prepared by Terry Cordray, a vocational rehabilitation counselor, who met with claimant on September 3, 2008, at the request of claimant's attorney. Mr. Cordray had prepared a list of 10 job tasks claimant had performed in the 15-year period before his work-related accident. Of the 10 tasks on that list, Dr. Pratt opined that claimant was unable to perform 2 for a 20 percent task loss.

Dr. Michael Poppa is a board certified independent medical examiner as well as being board certified in occupational and preventative medicine. He examined claimant on May 1, 2008, at the request of claimant's attorney. After taking a history of the accident, reviewing claimant's medical records, and performing a physical examination, Dr. Poppa found him to be at MMI and diagnosed him with a musculoligamentous sprain and strain involving his lumbar spine. He said that claimant's injury had two different components, one involving his lumbar spine and a second involving his pelvis. Dr. Poppa said claimant sustained a lumbar intervertebral disc injury creating a broad-based annular disc bulge with left lateral recessed stenosis at the L4-L5 level, as well as lumbar radiculopathy. As relates to claimant's pelvis, Dr. Poppa diagnosed claimant with bilateral sacroiliitis.

Using the *AMA Guides*, Dr. Poppa rated claimant as being in DRE Category III, for a 10 percent permanent partial impairment to the whole body for his lumbar spine. As a result of claimant's injury involving his pelvis, Dr. Poppa rated claimant as having a 5

⁴ Pratt Depo. at 12, 16.

⁵ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

percent permanent partial impairment of the whole body. These ratings combine for an overall impairment of the whole body of 15 percent.

Dr. Poppa recommended that claimant should avoid lifting greater than 30 pounds from floor to waist level on an occasional basis, greater than 45 pounds from waist to shoulder height on an occasional basis, or greater than 35 pounds overhead on an occasional basis. Carrying, pushing and pulling should be limited to 40 pounds on an occasional basis. In addition, claimant should avoid waist bending or twisting greater than on an occasional basis. Dr. Poppa reviewed the task list prepared by Mr. Cordray. Of the 10 tasks on the list, Dr. Poppa said claimant would be unable to perform 3. One task, No. 10, he had a question about and did not set forth an opinion. Therefore, he opined that claimant had a 33 percent task loss.

Dr. Poppa was aware that claimant had chiropractic treatments prior to his accident, but he did not believe claimant had any permanent impairment due to that prior condition. Further, he testified that in his opinion, claimant was not physically capable of working during the period from his work-related accident to September 26, 2007, as a result of the work accident.

Dr. Poppa reviewed medical bills incurred by claimant that had not been authorized by respondent and stated the medical treatment listed was necessary due to claimant's work related injury, and the charges on the summary sheet were reasonable. Dr. Poppa also reviewed a printout from claimant's personal health insurance carrier showing medical bills not entered as exhibits by claimant. Dr. Poppa stated the printout corresponded with medical attention claimant received because of his injury, were medically necessary due to his work injury, and the charges were reasonable.

Dr. Vito Carabetta is board certified in physical medicine and rehabilitation. He examined claimant on March 10, 2009, by order of the ALJ. Dr. Carabetta was asked to examine claimant regarding body as a whole, functional impairment, and restrictions, but he was specifically asked not to address causation.

Claimant's chief complaint to Dr. Carabetta was low back pain, although he stated he was improved and only about one third of the original pain remained. He stated, however, that he experienced some radiating symptoms into the posterior thigh region bilaterally, more right than left. After examining claimant, Dr. Carabetta found him to be at MMI and diagnosed him with chronic lumbar sprain. Based on the *AMA Guides*, Dr. Carabetta rated him as being in DRE Category II, having a 5 percent permanent partial impairment to the whole body.

Dr. Carabetta recommended restrictions of maximum occasional lifting not to exceed 50 pounds. More frequent lifting or carrying should not be beyond the 25 pound range. He should only occasionally participate in bending or stooping activities. Dr. Carabetta also believed that claimant should not perform frequent twisting. He reviewed

the task list prepared by Mr. Cordray. Of the 10 tasks on the list, Dr. Carabetta concluded that claimant would be unable to perform 4 for a 40 percent task loss.

Claimant was released from treatment by Dr. Pratt in April 2008, after which he called respondent and was told he could not return if he had restrictions. After that, claimant got a job, starting on June 2, 2008,⁶ at Beauty Brands working as a massage therapist. He worked there until March 2009, when he moved to Arizona. While working at Beauty Brands, he earned an average of \$300 to \$350 per week plus fringe benefits. He did not know how much Beauty Brands paid towards those benefits, however.

After claimant moved to Arizona, he worked as a server at Olive Garden. While there, his earnings averaged \$200 to \$300 per week. He worked there from March to July 2009, then left because he needed to earn more money. In July 2009, he started working as a server at another restaurant, Dave & Buster's, where he continues to work. He works about 30 hours a week and earns about \$300 to \$350. He received fringe benefits at both Olive Garden and Dave & Busters. There was no evidence in the record as to the cost of the fringe benefits those employers provided.

Raquel Serrano has worked as the human resources manager at respondent since February 2008. Ms. Serrano testified that Concentra is respondent's company doctor. Concentra was considered the authorized company medical provider for workers compensation purposes when claimant alleged his injury in August 2007. She testified that to her knowledge, neither Dr. Barbieri nor St. Joseph have ever been considered authorized company physicians for workers compensation purposes.

In a letter dated June 12, 2009, mailed to claimant at his address in Arizona, respondent offered him a position as an assistant machine operator. He was offered a base pay of \$16.90 per hour, or 91.6 percent of his preinjury hourly rate. The job proposal included a reinstatement of claimant's fringe benefit package. The letter indicated that respondent expected claimant to strictly follow his restrictions of maximum occasional lifting not to exceed 50 pounds, more frequent lifting or carrying not to exceed 25 pounds, and only occasionally bending or stooping. Claimant was told in the letter that he was expected to report to work on June 26, 2009. Claimant did not report to work on that date, nor did he respond to the offer.

Ms. Serrano testified that respondent did not have any available positions to offer claimant when he was released from treatment in April 2008. She said it would also have been difficult for respondent to accommodate Dr. Pratt's restrictions. She said that to the best of her knowledge, the position offered to claimant in June 2009 would have complied with Dr. Carabetta's restrictions.

⁶ R.H. Trans. at 34.

Ms. Serrano testified that respondent is an international company with more than 60 box plants, including a plant in Arizona. The job claimant was offered in June 2009 was in the plant in Kansas City. Ms. Serrano had no information as to whether claimant contacted respondent's facility in Arizona to inquire about accommodated work there.

Claimant said that because his temporary total disability payments were not on time or consistent, he could not afford to keep his children with him, so they moved to Arizona to live with their mother. In order for him to be with his children, he moved to Arizona on March 17, 2009. By the time claimant received the job offer from respondent, he had enrolled his children in school and had signed a lease on a place to live. Also, he said the job respondent offered him was as a machine operator operating the same machine he had previously worked on. Claimant stated he could not physically do that job again even if he had not moved.

PRINCIPLES OF LAW AND ANALYSIS

(1) Did claimant sustain an accidental injury that arose out of and in the course of his employment with respondent?

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts 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."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁷ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁸

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection

⁷ K.S.A. 2009 Supp. 44-501(a).

⁸ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁹

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹⁰ The test is not whether the accident causes the condition but whether the accident aggravates or accelerates the condition.¹¹ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.¹²

The greater weight of the evidence supports a finding that claimant sustained personal injury by an accident at work on August 24, 2007, as alleged. Claimant's testimony in this regard is uncontroverted. Furthermore, all of the physicians who testified agree that claimant's injuries are consistent with claimant's history of having injured his back while lifting and twisting to load the machine. The claimant's accident and injury arose out of and in the course of his employment with respondent.

(2) What is the nature and extent of claimant's disability?

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

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 percentage, of the loss of a portion of the total

⁹ *Id.* at 278.

¹⁰ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

¹¹ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

¹² *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

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.

After being released from medical treatment by Dr. Pratt with restrictions, claimant contacted respondent about returning to work. Claimant was advised that no accommodated work was available. Claimant was further advised that he would only be allowed to return to work if he was released without restrictions. Claimant's actual post-injury earnings were consistently less than 90 percent of his preinjury average weekly wage. Therefore, claimant is entitled to an award of permanent partial disability compensation based upon his actual post-injury earnings averaged with his percentage of task loss. The Board agrees with the ALJ's work disability findings and calculations, including his finding that claimant has suffered a 31 percent loss of his task performing ability.

(3) Is respondent responsible for the payment of claimant's outstanding medical bills and reimbursement to claimant's personal health insurance provider for its lien? If not, is claimant entitled to unauthorized medical compensation? Is claimant entitled to reimbursement for his medical mileage?

K.S.A. 2009 Supp. 44-510h states in part:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

.....
(b)(2) Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

Before obtaining medical treatment on his own, claimant attempted to contact respondent. When his calls were not immediately returned, because of his pain, claimant went on his own to the emergency room. While there, he received a call from respondent, and Concentra was authorized. This emergency room treatment was reasonable and necessary and is ordered paid by respondent as authorized medical.

Thereafter, while at Concentra waiting for treatment, claimant passed out due to the pain from his work-related injury. While unconscious, he was transported by ambulance to KUMC. Claimant did not choose this facility. This treatment was reasonable and necessary and is ordered paid by respondent as authorized medical.

Claimant was seen two times at Concentra. On September 7, 2007, he was released and told no additional authorized medical treatment would be provided by Concentra because his condition was not work related. Three physicians, including Dr. Pratt, have described claimant's subsequent treatment that he obtained on his own as reasonable and necessary. All medical treatment claimant obtained on his own thereafter is ordered paid by respondent as authorized medical treatment.

During oral argument to the Board, respondent acknowledged that it would be liable for claimant's medical mileage expenses if the claim is found compensable and if such expenses are not subject to the cap as unauthorized.

(4) Is respondent entitled to a credit pursuant to K.S.A. 2009 Supp. 44-501(c) for claimant's preexisting impairment?

K.S.A. 2009 Supp. 44-501(c) states: "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."

K.S.A. 44-510e requires that functional impairment be determined based upon the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. The Board has held that any preexisting functional impairment must also be determined utilizing the same criteria.¹³

Respondent admits that no physician has said that claimant had a preexisting impairment that was rateable under the *AMA Guides* and, therefore, respondent acknowledges that it is not entitled to a credit or offset for preexisting functional impairment. Nevertheless, respondent contends that pursuant to K.S.A. 2009 Supp. 44-501(c), respondent is not responsible for claimant's permanent partial disability because

¹³ See *Leroy v. Ash Grove Cement Company*, No. 88,748 (Kansas Court of Appeals unpublished opinion filed April 4, 2003).

the work-related injury did not cause claimant's disability. Instead, claimant's functional impairment was a natural progression of his preexisting degenerative condition, and it was claimant's refusal of the job respondent offered in June 2009 that has caused claimant's wage loss and gives rise to a work disability under K.S.A. 44-510e(a). The Board disagrees with this interpretation of K.S.A. 2009 Supp. 44-501(c) and further finds that claimant's wage loss, task loss, and work disability is directly attributable to his August 24, 2007, injury. Furthermore, even under a good faith analysis, claimant was justified in refusing respondent's belated job offer. Claimant attempted to return to work for respondent after he was released with permanent restrictions by Dr. Pratt in April 2008 but was told he could not return to work if he had restrictions. Over a year later, when respondent did offer claimant a job at the Kansas City location, respondent was aware that claimant had moved to Arizona due to economic hardships claimant had incurred as a result of his injury and inability to work. Respondent did not offer claimant a job at its Arizona facility. Furthermore, it is not clear that the job claimant was offered was within his restrictions. As for claimant's underlying physical condition, the Board finds claimant suffered a permanent injury and has a 5 percent impairment of function to his back as a direct result of the accident at work on August 24, 2007.

(5) Is claimant entitled to future medical compensation?

K.S.A. 44-510j(h) states in part:

If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.

Respondent conceded at oral argument that if this claim is compensable, then claimant is entitled to future medical treatment upon application and approval by the Director.

(6) Is claimant entitled to additional temporary total disability benefits?

Temporary total disability exists when an employee, on account of a work-related injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment.¹⁴ K.S.A. 44-510c(b)(1) states:

Where temporary total disability results from the injury, no compensation shall be paid during the first week of disability, except that provided in K.S.A. 44-510h and 44-510i and amendments thereto, unless the temporary total disability exists for three consecutive weeks, in which case compensation shall be paid for the first week of such disability. Thereafter weekly payments shall be made during

¹⁴ K.S.A. 44-510c(b)(2).

such temporary total disability, in a sum equal to 66 2/3% of the average gross weekly wage of the injured employee, computed as provided in K.S.A. 44-511 and amendments thereto, but in no case less than \$25 per week nor more than the dollar amount nearest to 75% of the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto, per week.

Respondent conceded during oral argument to the Board that if this claim is compensable, then claimant is entitled to the weeks of temporary total disability compensation awarded by the ALJ.

CONCLUSION

(1) Claimant sustained personal injury by accident on August 24, 2007, that arose out of and in the course of his employment with respondent.

(2) Claimant is entitled to an award of temporary total disability compensation followed by permanent partial disability compensation based upon the average of his actual wage loss and his 31 percent task loss.

(3) Respondent shall pay as authorized medical all of claimant's outstanding medical bills and mileage expenses and shall reimburse claimant's personal health care provider for all related treatment expenses, subject to the Kansas medical fee schedule.

(4) Respondent is not entitled to a credit pursuant to K.S.A. 2009 Supp. 44-501(c).

(5) Claimant is entitled to future medical upon application to and approval of the Director.

(6) Claimant is entitled to the additional weeks of temporary total disability compensation ordered by the ALJ in the Award.

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, she must file and submit her written contract with claimant to the Director for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated December 16, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kathleen A. McNamara, Attorney for Claimant
Gary R. Terrill and Ryan Weltz, Attorneys for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge