

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RONALD E. NELSON)
Claimant)
)
V.)
)
HOLTON COUNTRY MART)
Respondent)
)
AND)
)
TECHNOLOGY INSURANCE COMPANY)
Insurance Carrier)

Docket No. 1,067,183

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the May 12, 2015, Award entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Board heard oral argument on September 9, 2015. Michael J. Patton of Topeka, Kansas, appeared for claimant. Kendra M. Oakes of Kansas City, Kansas, appeared for respondent.

The ALJ found claimant sustained a 36.35 percent permanent partial general (work) disability, inclusive of a 10 percent functional impairment to the body as a whole, as a result of his work-related accident on September 12, 2013. The ALJ found claimant entitled to future medical treatment and the payment of a \$78.00 bill as an authorized medical expense. The ALJ also found an overpayment of temporary total disability (TTD) benefits as to the benefit rate in the amount of \$185.35.

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

ISSUES

Respondent argues claimant sustained only a 10 percent permanent partial functional impairment to the body as a whole and is not entitled to an award for a work disability. Respondent contends claimant failed to prove a sufficient wage loss to qualify for a work disability. Further, respondent argues it is entitled to a credit for an overpayment of TTD based on the benefit rate and the dates claimant was temporarily disabled.

Claimant contends the Award should be affirmed.

The issues for the Board's review are:

1. What is the nature and extent of claimant's disability?
2. Is respondent entitled to a credit for an overpayment of TTD based on the benefit rate and the dates of temporary disability?

FINDINGS OF FACT

Claimant began employment with respondent in April 2013 as a meat cutter. In this position, claimant cut meats and stocked the display case and freezers. Claimant lifted boxes weighing over 90 pounds. On September 12, 2013, claimant was stocking meats in the display case when he suffered a sharp, severe pain in his back near his left lower hip. Claimant explained he was stocking the front of a cold case with packages from a box weighing approximately 20 to 30 pounds. He testified he was in an awkward position, leaning forward at about knee level and reaching approximately four feet from his body when the pain began. Claimant described the pain as taking his breath away. He needed the assistance of a co-worker to stand up. Claimant stated he had no problems with his back prior to the accident.

Claimant reported the incident to respondent and was provided conservative treatment in the form of physical therapy and medication. Injections were recommended, but claimant declined.

Dr. Daniel Zimmerman examined claimant on April 25, 2014, at claimant's counsel's request. Dr. Zimmerman reviewed claimant's history, medical records, took x-rays and performed a physical examination. Dr. Zimmerman found claimant sustained a lumbar disc annular tear at L5-S1 with right and left lower extremity radicular sensory and motor dysfunction. Dr. Zimmerman noted the prevailing factor for claimant's injury was the September 12, 2013, work-related accident at respondent.

Using the AMA *Guides*,¹ Dr. Zimmerman opined claimant sustained an 18 percent permanent partial impairment to the body as a whole. Dr. Zimmerman based his rating on claimant's weakness, range of motion, and the annular tear. Dr. Zimmerman did not use the preferred DRE method, but instead relied on his examination and expertise. Dr. Zimmerman agreed claimant was in DRE Category III for a 10 percent impairment to the body as a whole.

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.

Dr. Zimmerman found claimant to be at maximum medical improvement (MMI) and imposed the following permanent restrictions:

[Claimant is] capable of lifting 20 pounds on an occasional basis and 10 pounds on a frequent basis. He should avoid frequent flexing of the lumbosacral spine and thus avoid frequent bending, stooping, squatting, crawling, kneeling and twisting activities.²

Dr. Zimmerman opined claimant should have future medical care, including a therapeutic dosing schedule of non-steroidal anti-inflammatory medication and, if necessary, lumbar epidural steroid injections by a pain management specialist.

Dr. Peter Bieri, a court-appointed physician, examined claimant on October 7, 2014. Claimant continued to have low back pain radiating into both hips, the left worse than the right. Claimant described pain, numbness and tingling extending through the entire left lower extremity and to the right knee. Dr. Bieri reviewed claimant's medical records, history, and performed a physical examination. Dr. Bieri found claimant sustained a lumbar strain superimposed on preexisting spondylolisthesis at L5-S1, with disc bulging and an annular tear. Dr. Bieri determined claimant's work-related accident was the prevailing factor for his diagnoses, treatment, and residual permanent impairment.

Using the *AMA Guides*, Dr. Bieri determined claimant sustained a 10 percent whole person impairment for DRE Lumbosacral Category III. Dr. Bieri indicated he used the DRE Method, with the Range of Motion Model as a differentiator. Dr. Bieri determined claimant had reached MMI and issued permanent restrictions:

Based on review of documentation as provided and the results of clinical examination, considering the anatomic site of injury and degree of permanent impairment, I would conclude the claimant meets the general physical demand level defined as light-medium. This would limit occasional lifting to 40 lb., frequent lifting not to exceed 20 lb., and no more than 10 lb. of constant lifting. Additional factors can be evaluated in terms of intensity and duration of activity. Restrictions may be further expanded for loss of task-performing ability, if appropriate.³

Dr. Bieri recommended claimant continue with pain medication and consider epidural block injections.

Vocational rehabilitation counselor Dick Santner first interviewed claimant on July 7, 2014. In his report dated August 4, 2014, Mr. Santner outlined claimant's education and work history for the five years preceding the work accident. Mr. Santner noted claimant

² Zimmerman Depo. at 9.

³ Bieri IME (Oct. 7, 2014) at 5-6.

resides in Whiting, Kansas, a rural community with a population of approximately 200 people. Whiting is located in the vicinity of Holton and Seneca and is approximately 50 miles from Topeka, Kansas. Claimant was 54 years of age at the time of the interview with a high school education and a CDL. Claimant primarily performed installation, service and repair of telecommunications equipment and has relatively extensive experience and employer-based training in this field.

Mr. Santner was provided with the restrictions imposed by Dr. Zimmerman and opined:

I believe [claimant] is employable however marginally so and primarily because of the rural area in which he lives. His most promising prospects would likely be fast food related or working as a clerk in a liquor store. One other possibility would be for him to obtain a passenger endorsement for his CDL which would require passing a written examination and then obtain employment as a school bus driver. The difficulty with the latter is that the work is typically a split shift and unless he were able to obtain a job in Whiting or very close by, it would probably be impractical to seek employment of that nature. Another possibility would be telemarketing at a company such as Alorica in Topeka. This would entail a 50 mile drive each way for a \$10.00-\$11.00 per hour job.⁴

Mr. Santner noted the entry level jobs he mentioned earn between \$8.06 and \$8.78 per hour based upon the 2013 Kansas Wage Survey. He noted many of these positions, especially in rural areas, are not full-time and do not typically provide fringe benefits.

Claimant returned to Mr. Santner in January 2015 for a brief interview regarding a job not included in the August 2014 report. Mr. Santner added an additional task to his list following the interview, for a total of 26 unduplicated tasks.

Dr. Zimmerman reviewed the task list generated by Mr. Santner. Of the 26 unduplicated tasks on the list, Dr. Zimmerman opined claimant could no longer perform 14, for a 53.8 percent task loss. Dr. Bieri also reviewed Mr. Santner's task list and opined claimant could no longer perform 14, for a 53.8 percent task loss.

Steve Benjamin, a vocational expert, interviewed claimant on February 25, 2015, at respondent's request. Mr. Benjamin also obtained information related to claimant's education and work history for the five years preceding the work accident, finding claimant had a high school education, vocational school, employer-based training and a current CDL license. Mr. Benjamin noted claimant's labor market of Whiting, Kansas, includes the Topeka metropolitan area because it is within 50 miles. Mr. Benjamin reviewed the restrictions imposed by Drs. Zimmerman and Bieri. He opined claimant could re-enter the labor market in an entry level position such as bench assembler, order clerk/customer

⁴ Santner Depo., Ex. 2 at 3-4.

service representative, security guard, or nontouch truck driver. Mr. Benjamin estimated 50 percent of truck driving jobs are nontouch, meaning the driver is not required to load or unload freight, though he stated most nontouch driving positions were long-haul jobs.

Mr. Benjamin did not have a wage statement and based his opinion from claimant's interview. Mr. Benjamin opined:

[Claimant] reported that he was worked [sic] 40+ hours per week and earning \$12.00 per hour. . . . Only using 40 hours per week at \$12.00 would show [an] average weekly gross wage of \$480.00. Currently, [claimant] is not working, which would constitute a 100% wage loss.

However, in my professional opinion, I believe that [claimant] should be able to re-enter the open labor market and earn approximately \$405.20 (based on a 40 hour work week).⁵

Dr. Bieri reviewed the task list generated by Mr. Benjamin. Of the 38 unduplicated tasks on the list, Dr. Bieri opined claimant could no longer perform 17, for a 44 percent task loss.

Claimant has not worked since leaving respondent on September 12, 2013. Claimant testified he applied for various positions in his area but has been unable to find employment. He stated he continues to have pain and bending, stooping, kneeling, and extended walking or riding causes an increase in his symptoms.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(c) states:

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. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(h) states:

"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 unless a higher burden of proof is specifically required by this act.

⁵ Benjamin Depo., Ex. 2 at 5.

K.S.A. 2013 Supp. 44-510e(a) states, in part:

In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

(1) Weekly compensation for temporary partial general disability shall be 66 $\frac{2}{3}$ % of the difference between the average weekly wage that the employee was earning prior to the date of injury and the amount the employee is actually earning after such injury in any type of employment. In no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c, and amendments thereto.

(2)(A) 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. Compensation for permanent partial general disability shall also be paid as provided in this section where an injury results in:

(i) The loss of or loss of use of a shoulder, arm, forearm or hand of one upper extremity, combined with the loss of or loss of use of a shoulder, arm, forearm or hand of the other upper extremity;

(ii) the loss of or loss of use of a leg, lower leg or foot of one lower extremity, combined with the loss of or loss of use of a leg, lower leg or foot of the other lower extremity; or

(iii) the loss of or loss of use of both eyes.

(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury 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, until January 1, 2015, but for injuries occurring on and after January 1, 2015, based on the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7 $\frac{1}{2}$ % to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body

as a whole in cases where there is preexisting functional impairment;
and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

(i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.

(ii) The actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the administrative law judge pursuant to K.S.A. 44-510e(a)(2)(E), and amendments thereto.

(iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

...

(3) When an injured worker is eligible to receive an award of work disability, compensation is limited to the value of the work disability as calculated above. In no case shall functional impairment and work disability be awarded together.

The resulting award shall be paid for the number of disability weeks at the payment rate until fully paid or modified. 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. 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. Under no circumstances shall the period of permanent partial disability run concurrently with the period of temporary total or temporary partial disability.

K.S.A. 2013 Supp. 44-510c(b)(2)(A) states:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary restrictions for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, provided that if there is an authorized treating physician, such physician's opinion regarding the employee's work status shall be presumed to be determinative.

K.S.A. 2013 Supp. 44-525(c) states:

In the event the employee has been overpaid temporary total disability benefits as described in subsection (b) of K.S.A. 44-534a, and amendments thereto, and the employee is entitled to additional disability benefits, the administrative law judge shall provide for the application of a credit against such benefits. The credit shall first be applied to the final week of any such additional disability benefit award and then to each preceding week until the credit is exhausted.

ANALYSIS

1. What is the nature and extent of claimant's disability?

The ALJ found claimant sustained a 36.35 percent work disability. The Board disagrees. The ALJ found both vocational experts to be credible. Notwithstanding, the ALJ imputed a 40-hour work week when assessing the wage earning capacity based upon Mr. Santner's opinion. Mr. Santner opined claimant's work week would be limited to 30 hours per week because of the rural nature of the labor market. Multiplying the hourly rate opined by Mr. Santner by 40 hours per week, the ALJ found claimant's weekly wage earning capacity to be an average of \$322.40 and \$351.80, or \$337.10. Applying a 30-hour work week, as was Mr. Santner's opinion, the weekly wage earning capacity would be in a range from \$241.80 to \$263.40, an average of which is \$252.60.

Mr. Benjamin opined claimant could earn \$405.20 per week, based upon \$10.13 per hour working 40 hours per week. Finding each vocational expert to be equally credible, claimant has a wage earning capacity of \$328.90, averaging Mr. Santner's \$252.60 per week with Mr. Benjamin's \$405.20 per week. The result is a 31 percent wage loss, based upon a pre-injury average weekly wage of \$474.40.

The ALJ found claimant suffers a task loss of 50.5 percent. The Board disagrees. Dr. Bieri reviewed the task lists prepared by both Mr. Santner and Mr. Benjamin. The ALJ wrote, "Using Mr. Benjamin's task list, Dr. Bieri found Claimant has a task loss of forty-seven percent."⁶ Reviewing Dr. Bieri's task list and addendum dated March 9, 2015, Mr. Benjamin listed 37 unduplicated tasks. Dr. Bieri wrote "no" on 17 listed tasks, resulting in a task loss of 46 percent. Dr. Bieri assessed a task loss of 53 percent based upon the list prepared by Mr. Santner.

Dr. Zimmerman reviewed only the list prepared by Mr. Santner and found claimant suffered a 53.8 percent task loss. Dr. Zimmerman did not review the task list prepared by Mr. Benjamin. The Board agrees with the ALJ that the best indicator of task loss was an average of the high and low task loss opinions. Averaging Dr. Zimmerman's 53.8 percent task loss and Dr. Bieri's 46 percent task loss results in a 50 percent task loss.

Based upon a 31 percent wage loss and a 50 percent task loss, the claimant suffers a 40.5 percent work disability as a result of her work related injury while working for respondent.

⁶ ALJ Award (May 12, 2015) at 5.

2. Is respondent entitled to a credit for an overpayment of TTD based on the benefit rate and the dates of temporary disability?

K.S.A. 2013 Supp. 44-510c(b)(2)(A) requires a claimant to be temporarily incapable of engaging in any type of substantial and gainful employment in order to receive TTD benefits. An injury is no longer temporary when maximum recovery is reached or when the worker's condition becomes medically stationary or stable.⁷ The ALJ ordered the payment of 46.57 weeks of TTD benefits, a period that ended on August 4, 2014. Dr. Zimmerman found claimant's condition to be stable with no further diagnostic or therapeutic intervention warranted and assessed a permanent impairment on April 25, 2014. The Board finds that, at the point when claimant was given a permanent impairment rating, she was no longer temporarily disabled. Respondent overpaid TTD benefits from April 25, 2014, to August 4, 2014, a period of 14.57 weeks. Respondent is entitled to a credit for overpayment of TTD in the amount of \$4,662.40.

Respondent paid TTD benefits at the rate of \$320.00 per week. Based upon on the parties' stipulation regarding the average weekly wage and payment of benefits, claimant was receiving fringe benefits during the time period during which TTD was paid. As such, the basis for TTD compensation is \$474.40 per week, with a resulting compensation rate of \$316.28. TTD benefits were overpaid at the rate of \$3.72 per week. From the date of accident, September 12, 2013, through April 25, 2014, respondent is entitled to a credit in the amount of \$3.72 for 32 weeks, a total of \$119.04, for paying TTD at the higher rate.

Respondent is entitled to a credit for overpaid temporary total disability benefits in the amount of \$4,782.44 ($\$4,782.44 \div \$316.28 = 15.12$ weeks), which shall be credited to the end of the award as required by K.S.A. 2013 Supp. 44-525(c).

CONCLUSION

Claimant has proven she suffers a 40.5 percent work disability as a result of her work-related injury while working for respondent. Respondent overpaid TTD in the amount of \$4,782.44.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated May 12, 2015, is modified to reflect a 40.5 work disability and an overpayment of TTD.

⁷ *Rose v. Thornton & Florence Electric Co.*, 4 Kan. App.2d 669, 609 P.2d 1180 rev. denied, 228 Kan. 807 (1980).

The claimant is entitled to 32.00 weeks of temporary total disability compensation at the rate of \$316.28 per week or \$10,120.96, followed by 161.19 weeks of permanent partial disability compensation at the rate of \$316.28 per week or \$50,981.17, for a 40.5 percent work disability, making a total award of \$61,102.13, less amounts paid and less respondent's \$4,782.44 credit for the overpayment of 15.12 weeks of TTD, pursuant to K.S.A. 44-525(c). Credit for the overpayment of TTD shall be first applied to the final week of permanent partial disability and then to each preceding week until the credit is exhausted. After applying the \$4,782.44 credit for the overpayment of 15.12 weeks of TTD, claimant is entitled to a total award of \$56,319.69.

As of October 21, 2015 there would be due and owing to the claimant 32.00 weeks of temporary total disability compensation at the rate of \$316.28 per week in the sum of \$10,120.96 plus 77.72 weeks of permanent partial disability compensation at the rate of \$316.28 per week in the sum of \$24,581.28 for a total due and owing of \$34,702.24, which is ordered paid in one lump sum less amounts previously paid. Thereafter, when accounting for the TTD credit, the remaining balance in the amount of \$21,3617.45 shall be paid at the rate of \$316.28 per week for 68.35 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of October, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael J. Patton, Attorney for Claimant
mike@joepatton.com
michaelp35@gmail.com
lawoffice@joepatton.com

Kendra M. Oakes, Attorney for Respondent and its Insurance Carrier
koakes@mvplaw.com
bduncan@mvplaw.com

Rebecca A. Sanders, Administrative Law Judge

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RONALD E. NELSON)
Claimant)
)
V.)
)
HOLTON COUNTRY MART)
Respondent)
)
AND)
)
TECHNOLOGY INSURANCE COMPANY)
Insurance Carrier)

Docket No. 1,067,183

NUNC PRO TUNC
ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the May 12, 2015, Award entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Board heard oral argument on September 9, 2015. Michael J. Patton of Topeka, Kansas, appeared for claimant. Kendra M. Oakes of Kansas City, Kansas, appeared for respondent.

The ALJ found claimant sustained a 36.35 percent permanent partial general (work) disability, inclusive of a 10 percent functional impairment to the body as a whole, as a result of his work-related accident on September 12, 2013. The ALJ found claimant entitled to future medical treatment and the payment of a \$78.00 bill as an authorized medical expense. The ALJ also found an overpayment of temporary total disability (TTD) benefits as to the benefit rate in the amount of \$185.35.

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

ISSUES

Respondent argues claimant sustained only a 10 percent permanent partial functional impairment to the body as a whole and is not entitled to an award for a work disability. Respondent contends claimant failed to prove a sufficient wage loss to qualify for a work disability. Further, respondent argues it is entitled to a credit for an overpayment of TTD based on the benefit rate and the dates claimant was temporarily disabled.

Claimant contends the Award should be affirmed.

The issues for the Board's review are:

1. What is the nature and extent of claimant's disability?
2. Is respondent entitled to a credit for an overpayment of TTD based on the benefit rate and the dates of temporary disability?

FINDINGS OF FACT

Claimant began employment with respondent in April 2013 as a meat cutter. In this position, claimant cut meats and stocked the display case and freezers. Claimant lifted boxes weighing over 90 pounds. On September 12, 2013, claimant was stocking meats in the display case when he suffered a sharp, severe pain in his back near his left lower hip. Claimant explained he was stocking the front of a cold case with packages from a box weighing approximately 20 to 30 pounds. He testified he was in an awkward position, leaning forward at about knee level and reaching approximately four feet from his body when the pain began. Claimant described the pain as taking his breath away. He needed the assistance of a co-worker to stand up. Claimant stated he had no problems with his back prior to the accident.

Claimant reported the incident to respondent and was provided conservative treatment in the form of physical therapy and medication. Injections were recommended, but claimant declined.

Dr. Daniel Zimmerman examined claimant on April 25, 2014, at claimant's counsel's request. Dr. Zimmerman reviewed claimant's history, medical records, took x-rays and performed a physical examination. Dr. Zimmerman found claimant sustained a lumbar disc annular tear at L5-S1 with right and left lower extremity radicular sensory and motor dysfunction. Dr. Zimmerman noted the prevailing factor for claimant's injury was the September 12, 2013, work-related accident at respondent.

Using the AMA *Guides*,⁸ Dr. Zimmerman opined claimant sustained an 18 percent permanent partial impairment to the body as a whole. Dr. Zimmerman based his rating on claimant's weakness, range of motion, and the annular tear. Dr. Zimmerman did not use the preferred DRE method, but instead relied on his examination and expertise. Dr. Zimmerman agreed claimant was in DRE Category III for a 10 percent impairment to the body as a whole.

Dr. Zimmerman found claimant to be at maximum medical improvement (MMI) and imposed the following permanent restrictions:

⁸ 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.

[Claimant is] capable of lifting 20 pounds on an occasional basis and 10 pounds on a frequent basis. He should avoid frequent flexing of the lumbosacral spine and thus avoid frequent bending, stooping, squatting, crawling, kneeling and twisting activities.⁹

Dr. Zimmerman opined claimant should have future medical care, including a therapeutic dosing schedule of non-steroidal anti-inflammatory medication and, if necessary, lumbar epidural steroid injections by a pain management specialist.

Dr. Peter Bieri, a court-appointed physician, examined claimant on October 7, 2014. Claimant continued to have low back pain radiating into both hips, the left worse than the right. Claimant described pain, numbness and tingling extending through the entire left lower extremity and to the right knee. Dr. Bieri reviewed claimant's medical records, history, and performed a physical examination. Dr. Bieri found claimant sustained a lumbar strain superimposed on preexisting spondylolisthesis at L5-S1, with disc bulging and an annular tear. Dr. Bieri determined claimant's work-related accident was the prevailing factor for his diagnoses, treatment, and residual permanent impairment.

Using the *AMA Guides*, Dr. Bieri determined claimant sustained a 10 percent whole person impairment for DRE Lumbosacral Category III. Dr. Bieri indicated he used the DRE Method, with the Range of Motion Model as a differentiator. Dr. Bieri determined claimant had reached MMI and issued permanent restrictions:

Based on review of documentation as provided and the results of clinical examination, considering the anatomic site of injury and degree of permanent impairment, I would conclude the claimant meets the general physical demand level defined as light-medium. This would limit occasional lifting to 40 lb., frequent lifting not to exceed 20 lb., and no more than 10 lb. of constant lifting. Additional factors can be evaluated in terms of intensity and duration of activity. Restrictions may be further expanded for loss of task-performing ability, if appropriate.¹⁰

Dr. Bieri recommended claimant continue with pain medication and consider epidural block injections.

Vocational rehabilitation counselor Dick Santner first interviewed claimant on July 7, 2014. In his report dated August 4, 2014, Mr. Santner outlined claimant's education and work history for the five years preceding the work accident. Mr. Santner noted claimant resides in Whiting, Kansas, a rural community with a population of approximately 200 people. Whiting is located in the vicinity of Holton and Seneca and is approximately 50 miles from Topeka, Kansas. Claimant was 54 years of age at the time of the interview with

⁹ Zimmerman Depo. at 9.

¹⁰ Bieri IME (Oct. 7, 2014) at 5-6.

a high school education and a CDL. Claimant primarily performed installation, service and repair of telecommunications equipment and has relatively extensive experience and employer-based training in this field.

Mr. Santner was provided with the restrictions imposed by Dr. Zimmerman and opined:

I believe [claimant] is employable however marginally so and primarily because of the rural area in which he lives. His most promising prospects would likely be fast food related or working as a clerk in a liquor store. One other possibility would be for him to obtain a passenger endorsement for his CDL which would require passing a written examination and then obtain employment as a school bus driver. The difficulty with the latter is that the work is typically a split shift and unless he were able to obtain a job in Whiting or very close by, it would probably be impractical to seek employment of that nature. Another possibility would be telemarketing at a company such as Alorica in Topeka. This would entail a 50 mile drive each way for a \$10.00-\$11.00 per hour job.¹¹

Mr. Santner noted the entry level jobs he mentioned earn between \$8.06 and \$8.78 per hour based upon the 2013 Kansas Wage Survey. He noted many of these positions, especially in rural areas, are not full-time and do not typically provide fringe benefits.

Claimant returned to Mr. Santner in January 2015 for a brief interview regarding a job not included in the August 2014 report. Mr. Santner added an additional task to his list following the interview, for a total of 26 unduplicated tasks.

Dr. Zimmerman reviewed the task list generated by Mr. Santner. Of the 26 unduplicated tasks on the list, Dr. Zimmerman opined claimant could no longer perform 14, for a 53.8 percent task loss. Dr. Bieri also reviewed Mr. Santner's task list and opined claimant could no longer perform 14, for a 53.8 percent task loss.

Steve Benjamin, a vocational expert, interviewed claimant on February 25, 2015, at respondent's request. Mr. Benjamin also obtained information related to claimant's education and work history for the five years preceding the work accident, finding claimant had a high school education, vocational school, employer-based training and a current CDL license. Mr. Benjamin noted claimant's labor market of Whiting, Kansas, includes the Topeka metropolitan area because it is within 50 miles. Mr. Benjamin reviewed the restrictions imposed by Drs. Zimmerman and Bieri. He opined claimant could re-enter the labor market in an entry level position such as bench assembler, order clerk/customer service representative, security guard, or nontouch truck driver. Mr. Benjamin estimated 50 percent of truck driving jobs are nontouch, meaning the driver is not required to load or unload freight, though he stated most nontouch driving positions were long-haul jobs.

¹¹ Santner Depo., Ex. 2 at 3-4.

Mr. Benjamin did not have a wage statement and based his opinion from claimant's interview. Mr. Benjamin opined:

[Claimant] reported that he was worked [sic] 40+ hours per week and earning \$12.00 per hour. . . . Only using 40 hours per week at \$12.00 would show [an] average weekly gross wage of \$480.00. Currently, [claimant] is not working, which would constitute a 100% wage loss.

However, in my professional opinion, I believe that [claimant] should be able to re-enter the open labor market and earn approximately \$405.20 (based on a 40 hour work week).¹²

Dr. Bieri reviewed the task list generated by Mr. Benjamin. Of the 38 unduplicated tasks on the list, Dr. Beiri opined claimant could no longer perform 17, for a 44 percent task loss.

Claimant has not worked since leaving respondent on September 12, 2013. Claimant testified he applied for various positions in his area but has been unable to find employment. He stated he continues to have pain and bending, stooping, kneeling, and extended walking or riding causes an increase in his symptoms.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(c) states:

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. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(h) states:

"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 unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-510e(a) states, in part:

In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto,

¹² Benjamin Depo., Ex. 2 at 5.

the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

(1) Weekly compensation for temporary partial general disability shall be 66 $\frac{2}{3}$ % of the difference between the average weekly wage that the employee was earning prior to the date of injury and the amount the employee is actually earning after such injury in any type of employment. In no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c, and amendments thereto.

(2)(A) 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. Compensation for permanent partial general disability shall also be paid as provided in this section where an injury results in:

- (i) The loss of or loss of use of a shoulder, arm, forearm or hand of one upper extremity, combined with the loss of or loss of use of a shoulder, arm, forearm or hand of the other upper extremity;
- (ii) the loss of or loss of use of a leg, lower leg or foot of one lower extremity, combined with the loss of or loss of use of a leg, lower leg or foot of the other lower extremity; or
- (iii) the loss of or loss of use of both eyes.

(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury 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, until January 1, 2015, but for injuries occurring on and after January 1, 2015, based on the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

- (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7 $\frac{1}{2}$ % to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and
- (ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of

at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

(i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.

(ii) The actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the administrative law judge pursuant to K.S.A. 44-510e(a)(2)(E), and amendments thereto.

(iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the

pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

...

(3) When an injured worker is eligible to receive an award of work disability, compensation is limited to the value of the work disability as calculated above. In no case shall functional impairment and work disability be awarded together.

The resulting award shall be paid for the number of disability weeks at the payment rate until fully paid or modified. 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. 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. Under no circumstances shall the period of permanent partial disability run concurrently with the period of temporary total or temporary partial disability.

K.S.A. 2013 Supp. 44-510c(b)(2)(A) states:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary restrictions for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, provided that if there is an authorized treating physician, such physician's opinion regarding the employee's work status shall be presumed to be determinative.

K.S.A. 2013 Supp. 44-525(c) states:

In the event the employee has been overpaid temporary total disability benefits as described in subsection (b) of K.S.A. 44-534a, and amendments thereto, and the employee is entitled to additional disability benefits, the administrative law judge shall provide for the application of a credit against such benefits. The credit shall first be applied to the final week of any such additional disability benefit award and then to each preceding week until the credit is exhausted.

ANALYSIS

1. What is the nature and extent of claimant's disability?

The ALJ found claimant sustained a 36.35 percent work disability. The Board disagrees. The ALJ found both vocational experts to be credible. Notwithstanding, the ALJ imputed a 40-hour work week when assessing the wage earning capacity based upon Mr. Santner's opinion. Mr. Santner opined claimant's work week would be limited to 30 hours

per week because of the rural nature of the labor market. Multiplying the hourly rate opined by Mr. Santner by 40 hours per week, the ALJ found claimant's weekly wage earning capacity to be an average of \$322.40 and \$351.80, or \$337.10. Applying a 30-hour work week, as was Mr. Santner's opinion, the weekly wage earning capacity would be in a range from \$241.80 to \$263.40, an average of which is \$252.60.

Mr. Benjamin opined claimant could earn \$405.20 per week, based upon \$10.13 per hour working 40 hours per week. Finding each vocational expert to be equally credible, claimant has a wage earning capacity of \$328.90, averaging Mr. Santner's \$252.60 per week with Mr. Benjamin's \$405.20 per week. The result is a 31 percent wage loss, based upon a pre-injury average weekly wage of \$474.40.

The ALJ found claimant suffers a task loss of 50.5 percent. The Board disagrees. Dr. Bieri reviewed the task lists prepared by both Mr. Santner and Mr. Benjamin. The ALJ wrote, "Using Mr. Benjamin's task list, Dr. Bieri found Claimant has a task loss of forty-seven percent."¹³ Reviewing Dr. Bieri's task list and addendum dated March 9, 2015, Mr. Benjamin listed 37 unduplicated tasks. Dr. Bieri wrote "no" on 17 listed tasks, resulting in a task loss of 46 percent. Dr. Bieri assessed a task loss of 53 percent based upon the list prepared by Mr. Santner.

Dr. Zimmerman reviewed only the list prepared by Mr. Santner and found claimant suffered a 53.8 percent task loss. Dr. Zimmerman did not review the task list prepared by Mr. Benjamin. The Board agrees with the ALJ that the best indicator of task loss was an average of the high and low task loss opinions. Averaging Dr. Zimmerman's 53.8 percent task loss and Dr. Bieri's 46 percent task loss results in a 50 percent task loss.

Based upon a 31 percent wage loss and a 50 percent task loss, the claimant suffers a 40.5 percent work disability as a result of her work related injury while working for respondent.

2. Is respondent entitled to a credit for an overpayment of TTD based on the benefit rate and the dates of temporary disability?

K.S.A. 2013 Supp. 44-510c(b)(2)(A) requires a claimant to be temporarily incapable of engaging in any type of substantial and gainful employment in order to receive TTD benefits. An injury is no longer temporary when maximum recovery is reached or when the worker's condition becomes medically stationary or stable.¹⁴ The ALJ ordered the payment of 46.57 weeks of TTD benefits, a period that ended on August 4, 2014. Dr. Zimmerman

¹³ ALJ Award (May 12, 2015) at 5.

¹⁴ *Rose v. Thornton & Florence Electric Co.*, 4 Kan. App.2d 669, 609 P.2d 1180 *rev. denied*, 228 Kan. 807 (1980).

found claimant's condition to be stable with no further diagnostic or therapeutic intervention warranted and assessed a permanent impairment on April 25, 2014. The Board finds that, at the point when claimant was given a permanent impairment rating, she was no longer temporarily disabled. Respondent overpaid TTD benefits from April 25, 2014, to August 4, 2014, a period of 14.57 weeks. Respondent is entitled to a credit for overpayment of TTD in the amount of \$4,662.40.

Respondent paid TTD benefits at the rate of \$320.00 per week. Based upon on the parties' stipulation regarding the average weekly wage and payment of benefits, claimant was receiving fringe benefits during the time period during which TTD was paid. As such, the basis for TTD compensation is \$474.40 per week, with a resulting compensation rate of \$316.28. TTD benefits were overpaid at the rate of \$3.72 per week. From the date of accident, September 12, 2013, through April 25, 2014, respondent is entitled to a credit in the amount of \$3.72 for 32 weeks, a total of \$119.04, for paying TTD at the higher rate.

Respondent is entitled to a credit for overpaid temporary total disability benefits in the amount of \$4,782.44 ($\$4,782.44 \div \$316.28 = 15.12$ weeks), which shall be credited to the end of the award as required by K.S.A. 2013 Supp. 44-525(c).

CONCLUSION

Claimant has proven she suffers a 40.5 percent work disability as a result of her work-related injury while working for respondent. Respondent overpaid TTD in the amount of \$4,782.44.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated May 12, 2015, is modified to reflect a 40.5 work disability and an overpayment of TTD.

The claimant is entitled to 32.00 weeks of temporary total disability compensation at the rate of \$316.28 per week or \$10,120.96, followed by 161.19 weeks of permanent partial disability compensation at the rate of \$316.28 per week or \$50,981.17, for a 40.5 percent work disability, making a total award of \$61,102.13, less amounts paid and less respondent's \$4,782.44 credit for the overpayment of 15.12 weeks of TTD, pursuant to K.S.A. 44-525(c). Credit for the overpayment of TTD shall be first applied to the final week of permanent partial disability and then to each preceding week until the credit is exhausted. After applying the \$4,782.44 credit for the overpayment of 15.12 weeks of TTD, claimant is entitled to a total award of \$56,319.69.

As of October 21, 2015 there would be due and owing to the claimant 32.00 weeks of temporary total disability compensation at the rate of \$316.28 per week in the sum of

\$10,120.96 plus 77.72 weeks of permanent partial disability compensation at the rate of \$316.28 per week in the sum of \$24,581.28 for a total due and owing of \$34,702.24, which is ordered paid in one lump sum less amounts previously paid. Thereafter, when accounting for the TTD credit, the remaining balance in the amount of \$21,617.45 shall be paid at the rate of \$316.28 per week for 68.35 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of October, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael J. Patton, Attorney for Claimant
mike@joepatton.com
michaelp35@gmail.com
lawoffice@joepatton.com

Kendra M. Oakes, Attorney for Respondent and its Insurance Carrier
koakes@mvplaw.com
bduncan@mvplaw.com

Rebecca A. Sanders, Administrative Law Judge