BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID D. LANEY	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 137,350
HORNER CONSTRUCTION COMPANY, INC.	)	& 137,351
Respondent	)	
AND	)	
	)	
MARYLAND CASUALTY COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The claimant, the respondent and its insurance carrier, and the Kansas Workers Compensation Fund appealed from a September 29, 1994 Award by Special Administrative Law Judge William F. Morrissey.

APPEARANCES

Claimant appeared by his attorney, John J. Bryan of Topeka, Kansas. The respondent and its insurance carrier appeared by their attorney, J. Donald Lysaught, Jr., of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared not.

RECORD

The record considered by the Appeals Board is the same as that enumerated in the Award of the Special Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Special Administrative Law Judge and are adopted by the Appeals Board for this review. In addition, the parties agree that claimant is entitled to 153.43 weeks of temporary total disability compensation at the rate of $225.34 per week.

ISSUES

The single issue raised by the parties for determination by the Appeals Board is the nature and extent of claimant's disability in both docketed claims.

The matter of a credit pursuant to K.S.A. 44-510a was raised for the first time on appeal to this Board. As the issue was not presented to the Administrative Law Judge, pursuant to K.S.A. 1995 Supp. 44-555c, it will not be considered. *See* Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416 P.2d 771 (1966).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record and considered the briefs and arguments of the parties, the Appeals Board finds:

The Award entered by the Special Administrative Law Judge should be modified to find that the permanent partial disability benefits due claimant should be based upon his impairment of function rating in both docketed claims. The findings of fact and conclusions of law by the Special Administrative Law Judge as to those issues which were before him but which were not raised by any party to this appeal are hereby affirmed and adopted by the Appeals Board as its own findings and conclusions as if specifically set forth herein.

DOCKET NO. 137,351

This docketed claim arises out of a work-related injury sustained by claimant to his back, hips and right leg on June 28, 1988. Claimant received treatment for this injury at Lawrence Memorial Hospital and thereafter by William A. Bailey, M.D. Dr. Bailey released claimant to return to work on July 13, 1988 without restrictions. Thereafter, claimant performed his regular job duties as a construction laborer for respondent until he suffered a second injury as a result of lifting railroad ties on July 19, 1988. As a result of this second accident, which is the subject of Docket No. 137,350, claimant has been unable to return to his regular work with respondent. Because claimant was able to return to his regular duties with respondent following his initial accident, the Appeals Board finds that any work disability claimant has sustained is the result of the subsequent injury. Claimant's disability, in this docketed claim, should therefore be based upon his functional impairment.

The only medical evidence in this case concerning claimant's impairment of function from the June 28, 1988 accident is that given by Edward J. Prostic, M.D. Dr. Prostic opined that claimant possessed a 15 percent impairment following both accidents, to which he apportioned 2.5 percent to the first accident and 12.5 percent to the second.

Accordingly, the Appeals Board finds that claimant is entitled to a 2.5 percent permanent partial disability award in Docket No. 137,351.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey should be, and is hereby, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, David D. Laney, and against the respondent, Horner Construction Company, Inc., and its insurance carrier, Maryland Casualty Company, and the Kansas Workers Compensation Fund for an accidental injury which occurred June 28, 1988 and based upon an average weekly wage of $338.00, for 2 weeks of temporary total disability compensation at the rate of $225.34 per week or $450.68, followed by 413 weeks at the rate of $5.63 per week or $2,325.19 for a 2.5% permanent partial general body impairment of function, making a total award in Docket No. 137,351 of $2,775.87.

As of March 22, 1996, there is due and owing claimant 2 weeks of temporary total disability compensation at the rate of $225.34 per week or $450.68, followed by 401.43 weeks of permanent partial disability compensation at the rate of $5.63 per week in the sum of $2,260.05, for a total of $2,710.73 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $65.14 is to be paid for 11.57 weeks at the rate of $5.63 per week, until fully paid or further order of the Director.

Unauthorized medical expense of up to $350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

All compensation, medical expenses and costs are to be borne one-half by the respondent and one-half by the Kansas Workers Compensation Fund.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are assessed 50% to the respondent and 50% to the Kansas Workers Compensation Fund.

DOCKET NO. 137,350

As previously stated, claimant returned to work on July 13, 1988 and suffered another accidental injury at work on July 19, 1988. This injury, likewise, involved the

claimant's back, hips and right leg but also involved the left leg. The Appeals Board adopts the 15% permanent functional impairment rating opinion of Dr. Prostic for purposes of this docketed claim.

Because his is a "non-scheduled" injury, permanent partial disability compensation is to be determined pursuant to K.S.A. 1988 Supp. 44-510e(a), which provides in part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that 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 physiological capabilities of the human body as established by competent medical evidence."

Claimant presented the testimony of Lloyd Dean "Bud" Langston on the issue of work disability. Mr. Langston opined that claimant suffered a 26.3 percent reduction in his ability to earn a comparable wage, and an 87 percent loss of his ability to access the open labor market. Claimant contends that this evidence is uncontradicted and, therefore, should be considered conclusive and adopted by the Appeals Board in its entirety. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). By averaging the percentages of the reduction of claimant's ability to perform work in the open labor market and his ability to earn comparable wages, applying the formula approved in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), claimant contends that he is entitled to an award for a work disability of 56.65 percent.

The Special Administrative Law Judge combined the injuries and restrictions for both docketed claims to find claimant had sustained a loss of 87 percent in his ability to perform work in the open labor market. In so finding, the Special Administrative Law Judge adopted the opinion of Mr. Langston regarding claimant's labor market loss. However, the Special Administrative Law Judge rejected Mr. Langston's opinion concerning claimant's percentage of wage loss, finding instead that claimant was capable of earning a wage comparable to that which he was earning at the time of his injury. This finding was based in part upon the fact that following claimant's recuperation from his injuries, he was given vocational rehabilitation benefits which included training in drafting. Mr. Langston testified, on cross examination, concerning the average entry level wage for drafters, which the Special Administrative Law Judge determined to be comparable to claimant's pre-injury average weekly wage. Giving equal weight to claimant's 87 percent loss of ability to perform work in the open labor market and a zero percent loss in his ability to earn comparable wages, the Special Administrative Law Judge found claimant to have a 44 percent work disability as a result of both accidental injuries and entered one combined permanent partial disability award based upon a combination of both accidents.

Respondent argues that Mr. Langston's opinions are unreliable and should be disregarded. It is respondent's position that Mr. Langston's opinions are flawed, in part, due to his misunderstanding and misapplication of the restrictions given claimant by Dr. Prostic. Mr. Langston relied upon those restrictions in formulating his opinions as to claimant's loss of his ability to perform work in the open labor market and to earn comparable wages. The Appeals Board agrees.

Mr. Langston relied upon a computer program for his determination of claimant's labor market loss. In so doing, he eliminated the entire medium classification of work, even though he conceded that claimant retained the qualifications and physical capability to perform a significant percentage of jobs within that classification. As a result, the computer and Mr. Langston's resulting opinion greatly inflated the percentage of jobs claimant is no longer able to perform. The Appeals Board finds, therefore, the opinion testimony of Mr. Langston that claimant has sustained an 87 percent loss of labor market access to be untrustworthy and unreliable.

Mr. Langston also calculated claimant's labor market loss to be 28 percent if he assumed claimant retained the ability to perform all jobs within the medium exertional category of work. Clearly, Dr. Prostic's recommendation that claimant avoid prolonged standing would exclude many, perhaps even a majority, of the medium category jobs. Thus, while the 28 percent loss figure is not accurate, it could be considered the floor as to the percentage of the labor market lost to claimant. However, if the 28 percent labor market loss opinion is averaged with the zero percent loss of wage earning ability, the resulting 14 percent is less than the 15 percent impairment of function rating.

K.S.A. 1988 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."

The claimant has failed to meet his burden of proving a work disability in excess of the functional rating. Therefore, the award of permanent partial disability compensation should be based upon his 15 percent impairment of function in Docket No. 137,350.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey should be, and is hereby, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, David D. Laney, and against the respondent, Horner Construction Company, Inc., and its insurance carrier, Maryland Casualty Company, and the Kansas Workers Compensation Fund for an accidental injury which occurred July 19, 1988 and based upon an average weekly wage of $338.00, for 151.43 weeks of temporary total disability compensation at the rate of $225.34 per week or $34,123.24, followed by 263.57 weeks at the rate of $33.80 per week or $8,908.67 for a 15% permanent partial general body impairment of function, making a total award in Docket No. 137,350 of $40,031.91.

As of March 22, 1996, there is due and owing claimant 151.43 weeks of temporary total disability compensation at the rate of $225.34 per week or $34,123.24, followed by 249 weeks of permanent partial disability compensation at the rate of $33.80 per week in the sum of $8,416.20, for a total of $42,539.44 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $492.47 is to be paid for 14.57 weeks at the rate of $33.80 per week, until fully paid or further order of the Director.

Unauthorized medical expense of up $350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

All compensation, medical expenses and costs are to be borne one-half by the respondent and one-half by the Kansas Workers Compensation Fund.

Claimant's attorney fee contract is hereby approved insofar as it not inconsistent with K.S.A. 44-536.

Future medical benefits will be awarded only upon proper application to and approval of the Director.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are assessed 50% to the respondent and 50% to the Kansas Workers Compensation Fund to be paid direct as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Curtis, Schloetzer, Hedberg, Foster & Associates	
Transcript of Preliminary Hearing (8-23-89)	$244.80
Transcript of Preliminary Hearing (10-16-90)	$262.00
Transcript of Preliminary Hearing (1-9-92)	$190.70
Transcript of Preliminary Hearing (6-24-92)	$ 76.44
Transcript of Motion Hearing	$130.85
Transcript of Regular Hearing	$414.05

Appino & Achten Reporting Service	
Deposition of Juanita Laney	$ 69.30
Deposition of Leonard Laney	$147.40
Deposition of Lloyd Dean Langston	$420.25
Deposition of Ronald H. Combs	$368.10
Deposition of Winifred Endicott	$403.65
Gene Dolginoff Associates	
Deposition of Edward J. Prostic, M.D.	$433.20

IT IS SO ORDERED.

Dated this ____ day of March 1996.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: John J. Bryan, Topeka, KS
J. Donald Lysaught, Jr., Kansas City, KS
John C. Whitaker, Kansas City, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director