

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES BRANSTETTER)	
Claimant)	
VS.)	
)	Docket No. 160,652
VILLA DEL MAR APARTMENTS)	
Respondent)	
AND)	
)	
CONTINENTAL CASUALTY CO.,)	
Insurance Carrier)	

ORDER

ON the 2nd day of December, 1993, claimant's application for review of an October 29, 1993 Award entered by Assistant Director David A. Shufelt, acting as an Administrative Law Judge in this case, came on for oral argument before the Appeals Board by telephone conference.

APPEARANCES

The claimant appeared personally and through his attorney, Steven R. Wilson, of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Gregory D. Worth, of Kansas City, Kansas. There were no other appearances.

RECORD

The record before the Appeals Board is the same as that considered by the Administrative Law Judge as stated in his Award of October 29, 1993.

STIPULATIONS

The stipulations stated by the Administrative Law Judge in his Award of October 29, 1993, are adopted by the Appeals Board for purposes of this order.

ISSUES

- (1) What is the nature and extent of claimant's disability, if any?
- (2) What was claimant's average weekly wage at the time of the accident?
- (3) Whether claimant is entitled to vocational rehabilitation benefits.
- (4) Whether claimant is entitled to unauthorized and future medical benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) From injury on August 6, 1991, arising out of and in the course of his employment claimant sustained a 20 percent permanent partial general disability.

Claimant injured his low back on August 6, 1991, when he and a co-worker lost control of an air conditioning unit they were lifting to the roof of a building. When the unit weighing approximately 150 to 200 pounds slipped, claimant pulled it over a ledge to avoid having it land on his co-worker. The unit then landed on claimant and in the process claimant injured his low back.

Claimant received initial treatment at the St. Francis Hospital Emergency Room. After a second visit to the emergency room he was referred to Dr. Pollock, a board certified orthopedic surgeon, who prescribed physical therapy. Claimant returned to work September 10, 1991. After working three days in the office and approximately one week at his regular duties, claimant's condition worsened. He was again unable to work and returned to Dr. Pollock. Dr. Pollock ordered an MRI and from the results concluded that while there was bulging of the disc at L4-5, there was no nerve impingement. He gave steroid injections and prescribed work hardening. Claimant developed a ganglion cyst in his left wrist from lifting weights overhead during the work hardening program. Claimant has not returned to work.

Both Dr. Pollock and Dr. Schlachter evaluated claimant and testified regarding the nature and extent of his disability. Dr. Pollock, the treating physician, testified that functional capacity evaluations were done both before and after the work hardening program. The second functional capacity evaluation, performed on June 3, 1992, indicated claimant was functioning at the medium-heavy physical demand level. Dr. Pollock rated claimant at 14 percent general body impairment and indicated he was giving the rating according to AMA guidelines. He released claimant to return to his regular duties in June of 1992 without restriction. At his deposition, however, Dr. Pollock indicated he would restrict claimant to lifting no more than 75 pounds occasionally, 35 pounds frequently and 15 pounds continuously. He also indicated claimant should avoid bending and twisting more than six times per hour. He testified that he had not imposed these restrictions at the time he released claimant to return to work because he had thought the job would not require claimant to exceed these restrictions. He stated that if, as claimant had testified, claimant's work required lifting as much as 100 pounds, he did not believe claimant should do that work.

Dr. Schlachter determined claimant had a 13 percent general body disability on a functional basis. This rating included 10 percent for the injury to the low back and 3 percent for the ganglion cyst. Dr. Schlachter agreed that the neurological exam was negative and concluded, as had Dr. Pollock, there was no nerve impingement. He recommended more limiting restrictions than those recommended by Dr. Pollock. Specifically, he recommended claimant not engage in repetitive pushing, pulling, twisting or grasping motions with the left arm; that he not lift over 20 pounds with the left arm; that he avoid vibratory tools and cold environments; and that he not lift over 35 pounds on a repetitive basis or 45 pounds on a single basis. He indicated claimant should have a job where he can sit part-time and stand part-time.

Only one vocational expert, Mr. Hardin, testified. He provided evaluation as to loss of access to the open labor market and probable loss of wage based both on the restrictions recommended by Dr. Schlachter and on the restrictions indicated by the last functional capacity evaluation. Using Dr. Schlachter's restrictions he concludes claimant has a 55 percent to 60 percent loss of access to the open labor market and a 25 percent reduction in ability to earn a comparable wage. On the basis of the last functional capacity evaluation, he indicates claimant would have a 15 to 20 percent loss of access to the open labor market and an eight percent wage loss.

The Appeals Board finds that claimant has established by the weight of the credible evidence that he has sustained a work disability which is greater than his functional disability. The Appeals Board must, therefore, consider both loss of access to the open labor market and loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

After weighing evidence relating to both factors, the Appeals Boards finds claimant has sustained a 20 percent work disability. In reaching this conclusion, the Appeals Board has given greater weight to opinions of the treating physician and to the opinions of the vocational expert which are based upon the functional capacity evaluation. The Appeals Board does, however, consider loss of access to the open labor market to be most important in this instance.

Claimant was not returned to work with respondent. The record indicates claimant has made reasonable attempts but has been unable to find employment. Under these circumstances, loss of access to the open labor market appears to be the more significant operative factor and accordingly we find claimant is entitled to and should be awarded benefits based upon a 20 percent general disability.

(2) Claimant's average weekly wage was \$518.08.

The disagreement as to claimant's wage relates primarily to the base wage. The only evidence presented was the testimony of claimant that he earned \$1740 a month, had been paid a cash bonus of \$900 once during the previous year, and was provided lodging having a value of \$420 to \$440 per month. This yields a base pay of \$401.54, weekly rent of \$99.23 (average of \$420 and \$440 or \$430 x 12 months divided by 52 weeks), and weekly bonus value of \$17.31 (\$900 divided by 52 weeks equals \$17.31) for the total average weekly wage of \$518.08.

Respondent introduced no evidence as to wage but attached to its submission letter a wage statement showing a significantly lower wage. The Appeals Board agrees with the decision by the Administrative Law Judge that the respondent's wage statement was not properly introduced and should not be considered.

The Appeals Board also notes that the wage as found by the Board differs slightly from that found by the Administrative Law Judge. This is because the Administrative Law Judge used the weekly value for the bonus of \$17.85 suggested in respondent's submission letter. However, the \$17.31 indicted by claimant's submission letter corresponds to the evidence and is used here.

(3) Claimant is entitled to vocational rehabilitation benefits.

The Administrative Law Judge denied vocational rehabilitation benefits after finding that the evidence established claimant could earn a wage comparable to the wage he earned at the time of the accident. The evidence was, as provided in Mr. Hardin's deposition, that there exist jobs within the claimant's restrictions which do pay as much or more than claimant was earning. Mr. Hardin further testified, however, that more probably than not, based on claimant's education, training and experience what claimant would be able to earn after the accident would be lower by 25 percent using Dr. Schlachter's restrictions and lower by eight percent using the functional capacity evaluation restrictions. The theoretical existence of a comparable wage job or jobs does not necessarily make vocational rehabilitation services inappropriate.

The Appeals Board notes claimant has not returned to work since the accident. When he contacted respondent in June, 1992, after being released by Dr. Pollock, the respondent advised there was no position available to him. The record indicates claimant has attempted but has been unable to find employment. Mr. Hardin testified that in his opinion claimant would benefit from vocational rehabilitation services. Under the circumstances the Appeals Board believes that such services should be and are hereby ordered to be provided.

The Appeals Board does not, of course, attempt here to suggest what vocational services may be

appropriate. The Appeals Board does order that an assessment be done at respondent's expense, with temporary total benefits to start as of the effective date of this order. The action is remanded to the Administrative Law Judge for such further proceeds, if any, as may be necessary relating to vocational rehabilitation issues.

(4) Claimant is entitled to unauthorized medical expenses up to the statutory maximum and is entitled to future medical expenses only upon proper application to the Director.

WHEREFORE, an Award of Compensation is hereby made in accordance with the above stipulations and findings, in favor of the claimant, James Branstetter, and against the respondent, Villa Del Mar Apartments and the insurance carrier, Continental Casualty Company, for an accidental injury sustained on August 6, 1991.

The claimant is entitled to 43 weeks of temporary total disability. As of December 23, 1993, there would be due and owing to the claimant 43 weeks temporary total compensation at \$289.00 per week in the sum of \$12,427.00, plus 81.43 weeks permanent partial compensation at \$69.08 per week in the sum of \$5,625.18 for a total due and owing at that time of \$18,052.18.

Claimant is also entitled to vocational assessment at respondent's expense and such other vocational rehabilitation services as may thereafter be appropriate pursuant to K.S.A. 44-510g, with related temporary total benefits in the amount of \$289.00 to be paid beginning the effective date of this order. The action is remanded to the Administrative Law Judge for such further proceedings, if any, as may be necessary relating to the vocational rehabilitation services.

The Appeals Board orders that temporary total disability benefits be paid during assessment but leaves to the discretion of the Administrative Law Judge the decision as to whether temporary benefits shall be paid during vocational rehabilitation plan development or implementation, if any. As of December 23, 1993, there were 290.57 weeks of benefits remaining to be paid. The weekly benefit of \$69.08 will therefore cease when temporary total benefits begin. Once the temporary total benefits cease, weekly payments of \$69.08 will resume and will continue for the remainder of the 290.57 weeks, less the number of weeks of temporary total paid during vocational rehabilitation, unless the Award is reviewed and modified following vocational rehabilitation.

Pursuant to K.S.A. 44-536 the claimant's contract of employment with his counsel is hereby approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

BARBER & ASSOCIATES

Transcript of Regular Hearing \$ 58.50

CRS COURT REPORTING SERVICE

Deposition of Anthony Pollock, M.D. \$ 116.00

IRELAND COURT REPORTING

Transcript of Preliminary Hearing \$ 115.08

Continuation of Regular Hearing \$ 149.08

Total \$ 264.16

TODD REPORTING

Deposition of Ernest R. Schlachter, M.D. \$ 132.97

Deposition of Jerry D. Hardin \$ 206.23

Total \$ 339.20

IT IS SO ORDERED.

Dated this _____ day of December, 1993.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Steven R. Wilson, 1861 North Rock Road, Wichita, Kansas 67206
Gregory D. Worth, P.O. Box 14548, Lenexa, Kansas 66285
David A. Shufelt, Assistant Director
George Gomez, Director