

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

PERRY O'BRIEN)	
Claimant)	
VS.)	
)	Docket No. 166,174
RUSKIN DIVISION PHILLIPS INC.)	
Respondent)	
Self-Insured)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

On April 28, 1995, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Nelsonna Potts Barnes on March 8, 1995, came on for oral argument in Pittsburg, Kansas.

APPEARANCES

Claimant appeared by and through his attorney, Timothy A. Short of Pittsburg, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, Garry W. Lassman of Pittsburg, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Gilbert Gregory of Fort Scott, Kansas. There were no other appearances.

RECORDS AND STIPULATIONS

The record and stipulations, as specifically set forth in the Award of the Administrative Law Judge, were considered and are herein adopted by the Appeals Board.

ISSUES

- (1) The average weekly wage of the claimant on the date of accident.
- (2) The nature and extent of claimant's injury and/or disability.

Additional issues raised before the Administrative Law Judge at the time of regular hearing but not appealed to the Appeals Board are affirmed insofar as the opinions of the Administrative Law Judge are not contrary to the findings rendered herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant is a 26-year-old high school graduate who has been working manual labor since his high school graduation. On March 4, 1992, while working for respondent, he leaned over to pick up a piece of metal weighing approximately ten pounds when he felt a twisting, pinching sensation in his lower back followed by a sharp pain. Claimant notified his employer immediately and was referred to and treated at the Labette County Medical Center on March 9, 1992. Dr. Kevin Mosier, an orthopedic surgeon, became the authorized treating physician. He diagnosed a transitional vertebra with partial sacralization of L5, thinning of the pars interarticularis at L5 bilaterally, and an instability pattern of the lumbar spine at L4-5. Dr. Mosier stated claimant suffered from a preexisting congenital defect in his spine at L5 which precipitated the injury. He rated claimant at 5 percent functional impairment to the body as a whole and placed restrictions on him advising claimant to restrict his lifting to 25 pounds frequently, 30-50 pounds occasionally with no lifting over 50 pounds. Claimant was further advised to avoid overhead work, working in awkward positions, and was told to restrict his activities to include only occasional bending, stooping, twisting, squatting, kneeling, and crawling. He was to restrict his walking to 50 minutes at a time, 4-5 hours per day; with driving restricted to 50 minutes per time, 4-5 hours per day. Dr. Mosier also felt that claimant should alternate sitting and standing with limits of no more than 50 minutes at a time per activity.

Claimant was referred to Dr. John Wertzberger by Dr. Mosier for an examination on May 13, 1992. Dr. Wertzberger diagnosed synovitis of the low back and found a small, load-related protruding lumbar disc associated with congenital abnormalities. Dr. Wertzberger rated claimant at 12 percent functional impairment to the body as a whole and restricted claimant to lifting no more than 30 pounds occasionally, 10 pounds frequently. He felt claimant should restrict his bending, stooping, and crawling to occasional. Dr. Wertzberger also felt claimant should not climb but opined that he could walk and drive although he advised claimant to spend no more than two hours at a time sitting or standing for a total of four hours per day.

Claimant returned to work for respondent on March 4, 1992, only to be taken off work again on March 9, 1992. Claimant was off work from March 9 through March 23, 1992, was returned to work for a week, and had a flare up causing him again to be taken off of work effective March 31, 1992. Claimant was released May 13, 1992, but did not return to work with his employer, believing he would be unable to perform his work duties with respondent with the restrictions that had been placed upon him by Dr. Mosier. Claimant's work history then becomes somewhat clouded with claimant holding six different jobs through June, 1994. Of these jobs, only the job worked with Utermoehlen Trucking during the period January 25, 1994, through April 29, 1994, paid claimant a wage comparable to that which he was earning at the time of his injury with respondent. At the remaining jobs, claimant's wage was lower than the wage he was earning on the date of injury.

In proceedings under the Workers Compensation Act, the burden of proof is on the claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g).

At the time of his accident, claimant was a full-time employee earning \$11.51 per hour based upon a 40-hour work week. This computes to a base wage of \$460.40. Information provided by respondent indicates claimant also received an attendance bonus of \$19.55 during the 20-week period preceding his accident. Claimant also received health benefits in the monthly amount of \$521.00 which respondent provided.

During the 1.43 weeks claimant received temporary total disability compensation, neither the attendance bonus nor the health benefits would be included in claimant's average weekly wage as he continued to receive both. See K.S.A. 1991 Supp. 44-511. Thus, any temporary total disability compensation received by claimant would be based upon an average weekly wage of \$460.40. Once claimant's employment with his employer terminated, the attendance bonus and health benefits would be included in the average weekly wage increasing claimant's average weekly wage to \$487.43 per week.

The Administrative Law Judge, in computing the average weekly wage, included a portion titled vacation pay in the average weekly wage. Vacation pay is normally covered by the 40-hour work week provided by K.S.A. 44-511. It is noted that under K.S.A. 44-511(a)(2) the term "additional compensation" does not include vacation pay although it does include bonuses and employer paid health insurance. As such, the Appeals Board finds claimant's average weekly wage for the date of injury in question is \$487.43 per week, excluding the vacation pay.

Claimant was treated by Dr. Mosier with a referral to Dr. Wertzberger. Both provided opinions regarding claimant's functional impairment.

K.S.A. 1991 Supp. 44-510e(a) defines functional impairment as follows:

“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.”

Dr. Mosier felt claimant had suffered a functional impairment of 5 percent. Dr. Wertzberger opined claimant’s functional impairment was 12 percent. The Appeals Board finds, based upon a review of the evidence, that claimant has suffered an 8.5 percent functional impairment to the body as a whole as a result of the injuries suffered with the respondent on March 4, 1992.

K.S.A. 1991 Supp. 44-510(e) defines work disability as follows:

“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 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.”

Claimant was evaluated by two work disability experts regarding his loss of access to the open labor market and loss of ability to earn comparable wages. In reviewing the opinions of both Jerry Hardin and Karen Terrill, the Appeals Board must consider the reduction in claimant’s ability to perform work in the open labor market and claimant’s ability to earn comparable wages. The Supreme Court in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), held that both must be considered in light of the employee’s education, training, experience and capacity for rehabilitation when deciding claimant’s entitlement to work disability. It is noted that under K.S.A. 1991 Supp. 44-510e(a) a presumption of no work disability is created if the employee engages in work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury. This is a rebuttable presumption but it is claimant’s burden to rebut same should claimant have the ability or display the ability to perform work at a wage comparable to that which he was earning at the time of his injury.

Subsequent to his termination of employment with the respondent, claimant worked six jobs over the following two years. Of these six jobs, only claimant’s employment with Utermoehlen Trucking for a four month period from January 25 through April 29, 1994, resulted in claimant being able to earn a wage comparable to that which he was earning at the time of the injury. At the remaining five jobs, claimant’s wage was lower than that which he was earning with respondent on the date of injury. The Appeals Board finds, for purposes of this award, that during the period claimant was employed with Utermoehlen Trucking he failed to overcome the presumption found in K.S.A. 1991 Supp. 44-510e. During the remaining time subsequent to claimant’s termination of employment with respondent claimant successfully rebutted the presumption of no work disability in K.S.A.

1991 Supp. 44-510e. As such, the Appeals Board finds that during the period January 25, 1994, through April 29, 1994, claimant is entitled to a functional impairment of 8.5 percent. During the remainder of the time, subsequent to claimant's loss of employment with respondent, he is entitled to a work disability to be computed under the statutory guidelines set forth in K.S.A. 1991 Supp. 44-510e.

In reviewing the opinions of both Karen Terrill and Jerry Hardin, the Appeals Board finds claimant has suffered a loss of access to the open labor market of 44.25 percent. In reviewing the opinions of both Jerry Hardin and Karen Terrill regarding claimant's loss of ability to earn comparable wage, the Appeals Board notes neither Ms. Terrill nor Mr. Hardin used an appropriate average weekly wage in reaching their opinions. The average weekly wage found by the Appeals Board of \$487.43, when compared with Mr. Hardin's opinion that claimant could earn \$360.00 per week, computes to a 26 percent loss of wage earning ability. When the appropriate average weekly wage is compared to Ms. Terrill's opinion that claimant can earn \$370.00 per week, this results in a 24 percent loss of ability to earn an comparable wage. In considering both the opinions of Mr. Hardin and Ms. Terrill, the Appeals Board finds claimant has suffered a 25 percent loss of ability to earn a comparable wage as a result of the injury suffered on March 4, 1992.

The Court of Appeals, in discussing Hughes, noted that, in calculating permanent partial disability, a mathematical equation must be used. The Court, in Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409 (1991), noted that Hughes gave equal weight to the two elements and averaged the two in arriving at a percentage of disability. The Court of Appeals said that it was appropriate although not required to follow the guidelines in Hughes rather than to give more weight to one of the elements over the other. The Appeals Board in this instance finds no legitimate reason to place greater emphasis upon one element over the other. As such, the Appeals Board finds claimant has suffered a 34.6 percent permanent partial general body disability as a result of the injuries suffered while claimant was working with respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes issued on March 8, 1995, should be and is hereby modified and the claimant, Perry O'Brien, is granted an award against the respondent, Ruskin Division, a self-insured, and the Workers Compensation Fund for an accidental injury occurring on March 4, 1992, and based upon an average weekly wage of \$487.43.

Claimant is entitled to 1.43 weeks temporary total disability compensation at the rate of \$289.00 per week totalling \$413.27 followed by 15.14 weeks permanent partial functional disability at the rate of \$27.62 per week for an 8.5% permanent partial functional impairment, representing the following periods of time: March 5-8 while claimant continued to work for respondent; March 24-30 while claimant returned to work for respondent; and,

January 25, 1994, through April 29, 1994, while claimant worked for Utermoehlen Trucking, in the sum of \$418.02 followed by 398.43 weeks permanent partial general body work disability at the rate of \$112.44 per week in the amount of \$44,799.47 for a 34.6% permanent partial general body work disability and a total award of \$45,630.76.

As of August 30, 1996, there will be due and owing to claimant 1.43 weeks temporary total disability compensation at the rate of \$289.00 per week in the sum of \$413.27 followed by 15.14 weeks permanent partial general body functional impairment at the rate of 27.62 per week in the amount of \$418.02 followed by 217.71 weeks permanent partial general body work disability at the rate of \$112.44 per week in the sum of \$24,479.31 for a total of \$25,310.60 which is due and owing in one lump sum minus amounts previously paid. Thereafter, claimant is entitled to 180.72 weeks permanent partial general body work disability at the rate of \$112.44 per week in the amount of \$20,320.16 until fully paid or until further order of the Director.

Claimant is entitled to unauthorized medical expense up to the statutory maximum.

Future medical benefits are awarded upon proper application to and approved by the Director of the Division of Workers Compensation.

Claimant's attorney's fees are approved subject to the provisions of K.S.A. 1991 Supp. 44-536.

Additional issues decided by the Administrative Law Judge but not appealed to the Appeals Board are herein affirmed insofar as they are not in contradiction to the orders expressed herein.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and the Workers Compensation Fund, 50% to each per the stipulation of the parties to be paid as follows:

Karen Starkey, CSR	
Transcript of Preliminary Hearing	\$?
Patricia K. Smith	
Deposition of Perry O'Brien	\$248.80
Deposition of Jerry Hardin	\$ 85.90
Martin D. Delmont, C.S.R.	
Deposition of Kevin Mosier, M.D.	\$211.95
Hostetler & Associates, Inc.	
Deposition of John Wertzberger, M.D.	\$182.95

Court Reporting Service
Deposition of Karen Crist Terrill

\$141.00

IT IS SO ORDERED.

Dated this ____ day of September 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy A. Short, Pittsburg, KS
Garry W. Lassman, Pittsburg, KS
Gilbert Gregory, Fort Scott, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director