

RECORD AND STIPULATIONS

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

ISSUES

The issues to be considered on appeal are:

- (1) Whether claimant is entitled to additional temporary total disability from August 22, 1992, through August 28, 1992.
- (2) What is claimant's average weekly wage?
- (3) What is the nature and extent of claimant's disability?
- (4) Is claimant entitled to future medical benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes as follows:

- (1) Claimant is entitled to one additional week of temporary total disability for the period August 22, 1992, through August 28, 1992. Claimant testified that he was also off work and not able to work during the week of August 22, 1992, through August 28, 1992. This testimony is uncontroverted and the Appeals Board, therefore, finds claimant entitled to one additional week of temporary total disability in the amount of \$299.
- (2) The Appeals Board agrees with the finding by the Special Administrative Law Judge that claimant has an average weekly wage of \$655.50. Claimant was a self-employed truck driver who drove exclusively for Ohse Meats. The record reflects that during the 26 weeks preceding the date of claimant's injury, his company, R. D. Ferguson Trucking Company, received a total of \$61,480.97 in return for the driving he had done for Ohse Meats. The record also includes itemization of expenses paid during that 26 weeks.

The Special Administrative Law Judge calculated the average weekly wage by deducting certain of the expenses from the total sum claimant received for that 26 weeks. Specifically, he removed from the list of expenses certain payments to claimant for his meals, lodging, medical insurance, and medical expenses. He then deducted the remainder of the expenses, expenses which were considered operating expenses, from the total amount received to arrive at the \$655.50 per week average weekly wage.

Claimant argues that the average weekly wage should be arrived at by dividing the total of \$61,480.97 by the 26 weeks. Using this method the average weekly wage would be \$2,364.65. Claimant rests his argument on the language found in K.S.A. 44-511 which refers to the "gross" amount of money claimant earned during the 26 weeks preceding the date of accident.

The Appeals Board agrees with the methodology followed by the Special Administrative Law Judge. Monies claimant used to keep his equipment operational should not be considered money claimant earned. The gross amount claimant earns, as the term "gross" is used in K.S.A. 44-511, includes only money paid for work to the extent it results in economic gain to the claimant. Ridgway v. Board of Ford County Comm'rs, 12 Kan. App. 2d 441, 748 P.2d 891 (1987), rev denied 242 Kan. 903.

Claimant also objects to the subtraction of the business expenses on the grounds that the records introduced do not coincide exactly with the 26 weeks preceding the date of accident. This is so because the records show expenses for each full week. The 26 weeks preceding the date of accident, on the other hand, began and ended during the middle of the week. As a result, there is some overlapping and it is possible some of those expenses were paid outside the 26 weeks preceding the date of accident. The problem with the claimant's argument is that claimant has the burden of proof to establish the average weekly wage. He has shown a total amount received during the 26 weeks and the record shows a set of expenses, most of which were paid during the 26 weeks. In effect, the record showed a wage of not less than the \$655.50 per week found by the Special Administrative Law Judge. Claimant has met the burden of showing a wage in that amount but not more. If some of those expenses were incurred outside the 26 weeks, claimant has the burden of showing which ones and claimant has failed to meet his burden of showing a higher wage. Claimant has not done so and accordingly the Appeals Board affirms the finding by the Special Administrative Law Judge.

(3) The Appeals Board finds that claimant sustained an 18 percent permanent partial general body disability and the Special Administrative Law Judge's finding on this issue should also be affirmed. Claimant injured both his low back and neck in an August 17, 1992, accident when his tractor-trailer rig was struck by an automobile. Respondent argues that claimant should not be entitled to any award for any permanent impairment and directs the Board's attention to the evidence relating to claimant's prior injury and the testimony of Sergio Delgado, M.D. Dr. Delgado had seen claimant after an injury in 1986 and saw claimant again after the current injury in 1992. He testified that in his opinion claimant had no additional impairment following the 1992 injury. The Special Administrative Law Judge found that claimant did suffer additional aggravation and the Appeals Board agrees. Brett E. Wallace, M.D., testified that a majority of claimant's symptoms are long standing and predate this injury. He does not, however, testify that all of the impairment preexisted and by negative implication apparently concluded part of the disability to be new. Claimant had an increase in pain and a decrease in range of motion

following the 1992 accident. This conclusion is supported by claimant's testimony and that of Edward J. Prostic, M.D.

The Appeals Board also finds that claimant has a permanent partial general disability of 18 percent. Although Dr. Delgado did not believe there was additional impairment, he acknowledged that claimant had permanent impairment. It appears that his testimony would support a finding of 14 percent permanent partial functional impairment. Dr. Wallace's testimony, after adjustments were made at the time of his deposition, concluded that claimant has a 20 percent permanent partial general impairment. Dr. Prostic assessed the impairment as a 20 percent permanent partial general impairment. Based upon these three evaluations, the Appeals Board concludes that claimant has an 18 percent permanent partial general body disability.

(4) Claimant is entitled to future medical benefits upon application only. Claimant argues that he should be entitled to future medical benefits pursuant to his own authorization as the owner of the company. Specifically, respondent proposes to authorize his own chiropractic treatment. On a motion filed by the respondent's insurance carrier, the claimant's chiropractic treatment was terminated after a hearing by the Special Administrative Law Judge. In the Award, the Special Administrative Law Judge awarded future medical upon application only. From the evidence in this case, the Appeals Board finds that the claimant has not established an ongoing need for medical treatment sufficient to warrant awarding that treatment without subsequent application to the director. The Appeals Board, therefore, affirms the decision by the Special Administrative Law Judge and finds that future medical should be awarded upon application only.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey dated April 18, 1995, should be, and is hereby modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Robert D. Ferguson, and against the respondent, R. D. Ferguson Trucking Company, and its insurance carrier, CIGNA Insurance Company, for an accidental injury which occurred August 17, 1992, and based upon an average weekly wage of \$655.50 for 10.14 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$3,031.86, followed by 404.86 weeks at the rate of \$78.66 per week or \$31,846.29, for an 18% permanent partial general disability, making a total award of \$34,878.15.

As of October 31, 1996 there is due and owing claimant 10.14 weeks of temporary total disability compensation at the rate of \$299 per week or \$3,031.86, followed by 209.29 weeks of permanent partial compensation at the rate of \$78.66 per week in the sum of

\$16,462.75 for a total of \$19,494.61, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$15,383.54 is to be paid for 195.57 weeks at the rate of \$78.66 per week, until fully paid or further order of the Director.

Future medical benefits will be awarded only upon proper application to and approval of the director. Unauthorized medical expense of up to \$350 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

All compensation, medical expenses and administrative costs are to be borne 50 percent by the respondent and 50 percent 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 hereby assessed one half to the respondent and one half to the Kansas Workers Compensation Fund to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Appino & Biggs Reporting Service	
Transcript of Preliminary Hearing (10-21-92)	\$232.45
Transcript of Regular Hearing	\$262.40
Deposition of Paula Ferguson	Unknown
Deposition of Brett E. Wallace, M.D.	\$259.80
Deposition of Sergio Delgado	\$403.20
Deposition of Robert D. Ferguson	\$821.00
Correll Reporting Service	
Transcript of Preliminary Hearing (12-20-93)	Unknown
Gene Dolginoff & Associates	
Deposition of Edward J. Prostic, M.D.	\$354.50

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Gary R. Terrill, Overland Park, KS
Jeff K. Cooper, Topeka, KS
Philip S. Harness, Director