

The Administrative Law Judge found claimant entitled to permanent partial general body disability benefits based upon the claimant's functional impairment. The claimant appeals that finding by the Administrative Law Judge and requests the Appeals Board find a work disability in excess of the functional impairment. The issues for determination by the Appeals Board include nature and extent of claimant's disability and claimant's average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds that the findings of fact and conclusions of law as enumerated in the award of the Administrative Law Judge are accurate and appropriate with two exceptions; to wit, findings numbers one (1) and four (4). First, with regard to finding number four (4), the Appeals Board disagrees that claimant has not sustained his burden to overcome the presumption of no work disability. Second, with regard to finding number one (1), the Appeals Board disagrees that because claimant returned to work for a short time following his injury that fringe benefits are not relevant to a determination of average weekly wage following his layoff. The Appeals Board otherwise adopts all findings made by the Administrative Law Judge that are not inconsistent with the expressed rulings made herein.

The Appeals Board finds that the claimant has proven a work disability. His brief return to work with respondent following his medical release was not sufficient to give rise to the presumption of no work disability contained in K.S.A. 44-510(e). Following back surgery, Dr. Poole released claimant to return to work with restrictions of lifting of no more than fifty (50) pounds and with advice to restrict bending, stooping and lifting as much as possible. Claimant returned to work with respondent but after approximately two weeks he was laid off. During those two weeks claimant had to take off several days due to his back pain and discomfort. Claimant testified that he required two days off to recover after just working a day or two. He was taking Ibuprofen prescribed by Dr. Sweet. In claimant's opinion he was not able to perform the job tasks assigned to him. There is some question as to whether or not the job he was given to perform fell within the restrictions given by Dr. Poole. Claimant testified the bending and twisting bothered him to the point that he was sore and in pain. He was stiff when he got up in the morning and when he went home from work. Claimant used vacation time for the time he was off during those two weeks following his return to work. He estimates that he worked a total of five days before being laid off.

K.S.A. 1992 Supp. 44-510e provides:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Appeals Board finds that the claimant's return to work with respondent, where he only worked approximately five days out of a two week period, under the facts of this case does not give rise to the presumption of no work disability. Even were the presumption found to exist, the Appeals Board would find that it has been overcome by the evidence.

We will next address the issue of claimant's average weekly wage as it is a necessary prerequisite to a determination of claimant's work disability. The Administrative

Law Judge found claimant's average weekly wage to be \$722.95 including overtime and bonuses. The parties do not dispute that finding. The parties have provided a fringe benefit statement which shows average weekly fringe benefits of \$95.28. Respondent contends that fringe benefits are not applicable to this case because claimant was laid off for economic reasons and not due to his injury. The Appeals Board disagrees. From the date that claimant is laid off from his employment with the respondent he is placed into the open labor market with permanent restrictions which limit his ability to earn a comparable wage. The average weekly wage that he has lost includes fringe benefits, and it is the total wage which is relevant both to a determination of permanent partial disability benefits, and a determination of work disability.

The record in this case contains the opinions of two experts on the question of work disability. Jerry Hardin gives an opinion that claimant has sustained a forty to forty-five percent (40-45%) loss of ability to perform work in the open labor market taking into consideration the restrictions imposed by Dr. Poole, and a fifty-nine percent (59%) loss of ability to earn a comparable wage. However, Mr. Hardin used an incorrect figure as to claimant's average weekly wage with respondent. Using his opinion that claimant is capable of earning \$280 per week post-accident in the open labor market as compared to the correct average weekly wage of \$818.23 (\$722.95 plus \$95.28) results in a wage loss of sixty-six percent (66%). This compares to the opinion of Karen Crist Terrill that claimant has lost eleven percent (11%) of his ability to perform work in the open labor market and no loss of ability to earn a comparable wage. Pursuant to Hughes v. Inland Container Corp., 247 Kan. 407, 779 P.2d 1011 (1990), permanent partial disability is to be determined by both the extent (percentage) of reduction of the employee's ability to work in the open labor market and the employee's ability to earn a comparable wage. Both prongs of this two-part test must be considered in light of the employee's education, training, experience and capacity for rehabilitation. K.S.A. 1992 Supp. 44-510e(a). The Appeals Board finds the facts in this case do not suggest that either prong should be given greater weight. Similarly the opinions of both vocational experts should be taken into consideration in arriving at a percentage of work disability. In applying the Hughes rationale to these components, we find the claimant to have sustained a thirty percent (30%) permanent partial work disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark, dated April 8, 1994, is modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Merle Foster, and against the respondent, Boeing Military Airplanes, and the insurance carrier, Aetna Casualty & Surety, and the Workers Compensation Fund, for an accidental injury sustained on August 28, 1992. Per their stipulation, the respondent and insurance carrier shall be liable for 75% and the Kansas Workers Compensation Fund 25% of the cost of this Award.

The claimant is entitled to 50 weeks of temporary total disability at the rate of \$299.00 per week or \$14,950.00 followed by 365 weeks at \$163.65 per week or \$59,732.25 for a 30% permanent partial general body disability, making a total award of \$74,682.25. As of April 14, 1995, there would be due and owing to the claimant 50 weeks of temporary total compensation at \$299.00 per week in the sum of \$14,950.00 plus 87.14

weeks of permanent partial compensation at \$163.65 per week in the sum of \$14,260.46 for a total due and owing of \$29,210.46 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$45,471.79 shall be paid at \$163.65 per week for 277.86 weeks or until further order of the Director.

Medical expenses incurred by claimant as a result of his accidental injury shall be awarded to be paid by the respondent 75% and the Workers Compensation Fund 25%.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent 75% and Workers Compensation Fund 25% to be directly paid as follows:

Deposition Services	
Transcript of Regular Hearing	\$254.30
Deposition of Kenneth D. Zimmerman, M.D.	\$250.60
Don K. Smith & Assoc.	
Deposition of Bernard T. Poole, M.D.	\$163.00

IT IS SO ORDERED.

Dated this ____ day of April, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Kenneth Stevens, Wichita, KS
- Vaughn Burkholder, Wichita, KS
- Andrew Busch, Wichita, KS
- John D. Clark, Administrative Law Judge
- George Gomez, Director