

The Administrative Law Judge awarded claimant permanent partial general disability benefits based upon a fifty-five percent (55%) work disability. The respondent and insurance carrier requested this review and raised the issue of nature and extent of claimant's disability. That is the only issue now before this Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be modified. Claimant is entitled to permanent partial general disability benefits based upon the functional impairment rating of twelve percent (12%) for the period from November 10, 1992 through her last day of work on April 30, 1993. Thereafter, claimant is entitled to permanent partial general disability benefits based upon the fifty-five percent (55%) work disability as found by the Administrative Law Judge.

Claimant developed bilateral carpal tunnel syndrome while working for the respondent in her position as Project Manager Secretary. After a period of conservative treatment, claimant underwent carpal tunnel release surgery on her right hand in August 1992 and on her left hand in September 1992. The parties stipulated claimant's date of accident for purposes of this proceeding to be June 14, 1992.

After recuperating from surgery, claimant returned to work for the respondent on approximately November 10, 1992. Because the respondent was unable to provide accommodated employment, claimant was terminated on April 30, 1993. As of the date of regular hearing, claimant had been unable to find employment. Claimant was provided a vocational rehabilitation assessment, but it concluded that she would not benefit from rehabilitation services. Claimant testified her vocational rehabilitation counselor advised her there was nothing they could develop that would provide claimant a comparable wage or fall within her permanent work restrictions and limitations.

The parties presented the testimony of two medical experts. Board certified orthopedic surgeon Lanny W. Harris, M.D., testified that he treated claimant's hands and wrists beginning June 1992 and performed the carpal tunnel releases in August and September of that year. As a result of her work-related injury, Dr. Harris believes claimant has sustained a twelve percent (12%) functional impairment to the body as a whole and should restrict her activities to what she can tolerate. At pages 10 and 11 of his deposition, Dr. Harris said:

- "Q. Doctor, when you rated Ms. Lane and released her from your care, did you have recommendations regarding her physical activities? And I'm referring to your report of February 26, 1993.
- A. Basically, I told the patient she should be allowed to do all the activities she was able to tolerate, and we discussed that pretty extensively, agreeing, basically, to return to some type of light work with no restrictions placed, but with the knowledge that she has some difficulty tolerating prolonged typing and keyboard operations, in other words, greater than a couple of hours a day or heavy repetitive grasping or gripping. I didn't

really restrict her; I told her she could use her hands as much as she could tolerate.

Q. And at the time that you released her from your care in February of 1993, Doctor, what she was tolerating was no keyboard operations for more than two or three hours per day?

A. That's correct, yes.

Q. And she was not tolerating any heavy repetitive grasping or gripping; is that correct?

A. Yes.

Q. And your advice was that she stay within those guidelines?

A. Yes.

Q. Within what she could tolerate?

A. Yes."

Preston Brent Koprivica, M.D., was the other medical expert to testify. Dr. Koprivica is board certified in emergency medicine and became involved in this proceeding when the respondent and insurance carrier requested him to evaluate claimant. The doctor saw claimant on January 12, 1993. Although Dr. Koprivica agrees with Dr. Harris that claimant has sustained a twelve percent (12%) functional impairment to the body as a result of the bilateral carpal tunnel syndrome, he is more specific in the restrictions he believes claimant should observe. He believes claimant should limit her typing to two (2) hours or less of an eight (8) hour day; avoid highly repetitive activities; avoid repetitive pinching; avoid repetitive wrist motions of flexion, extension, and ulnar deviation; and avoid vibration of the wrist. Also, he believes claimant should not work overtime. The doctor found claimant a credible person.

Only one labor market expert testified, Michael J. Dreiling. Considering the doctors' restrictions, Mr. Dreiling believes claimant has sustained a loss of access to the open labor market in the range of sixty-four percent to seventy-five percent (64% to 75%), depending upon whether one includes or excludes the heavy and very heavy categories of labor as part of claimant's preinjury labor market. He also believes claimant has sustained either a forty-six percent (46%) or fifty percent (50%) loss of ability to earn a comparable wage, depending upon whether one includes or excludes the additional compensation items claimant received while employed with the respondent.

Based upon the testimony of Mr. Dreiling, the Administrative Law Judge found claimant sustained a sixty-four percent (64%) loss of ability to perform work in the open labor market and a forty-six percent (46%) loss of ability to earn a comparable wage. Applying the provisions of K.S.A. 1991 Supp. 44-510e, the Administrative Law Judge averaged those losses and found a fifty-five percent (55%) work disability.

Because she has sustained a "non-scheduled injury", claimant is entitled permanent partial general disability benefits under the provisions of K.S.A. 1991 Supp. 44-510e. The statute provides in pertinent 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. 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."

For the period between November 10, 1992 and April 30, 1993, the period claimant returned to work for the respondent, the Appeals Board finds claimant is entitled to permanent partial general disability benefits based upon her functional impairment rating of twelve percent (12%). For this period, the Appeals Board applies the presumption of no work disability as contained in K.S.A. 1991 Supp. 44-510e as cited above because the claimant was able to earn wages comparable to what she was earning when injured. For this period, claimant's benefits are to be computed using an average weekly wage of \$517.88, which the parties agree to be the average weekly wage excluding additional compensation items. Additional compensation items are not included in the computation of average weekly wage until they are discontinued. See K.S.A. 1991 Supp. 44-511.

For the period after April 30, 1993, the Appeals Board adopts the conclusion of the Administrative Law Judge that claimant is entitled permanent partial general disability benefits based upon a fifty-five percent (55%) work disability. Although the Appeals Board may have reached a slightly different percentage of work disability if we were to have decided this case in the first instance, the finding of fifty-five percent (55%) work disability falls within a reasonable range and the finding is, therefore, adopted by this Board. The Appeals Board is not required to weigh equally 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, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). For this period, claimant's benefits are to be computed using an average weekly wage of \$558.42 which the parties agreed was the average weekly wage including additional compensation items.

The Appeals Board hereby adopts the findings and conclusions of the Administrative Law Judge that are not inconsistent with the findings specifically set forth above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler, dated June 1, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Melissa K. Lane, and against the respondent, Walton Construction Company, and its insurance carrier, Builders Association Self-Insurance Fund, for an accidental injury which occurred June 14, 1992 and based upon an average weekly of \$517.88, for 23 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$6,647.00, followed by 24.57 weeks of permanent partial disability compensation at the rate of \$41.43 per week or \$1,017.94 for a 12% permanent partial general body disability, followed by 367.43 weeks of permanent partial disability compensation at the rate of \$204.76 per week or \$75,234.97 for a 55% permanent partial general disability based upon an average weekly wage of \$558.42, making a total award of \$82,899.91.

As of September 29, 1995, there is due and owing claimant 23 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$6,647.00, followed by 24.57 weeks of permanent partial disability compensation at the rate of \$41.43 per week in the sum of \$1,017.94, followed by 124.14 weeks permanent partial disability compensation at the rate of \$204.76 per week in the sum of \$25,418.91, for a total of \$33,083.85 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$49,816.06 is to be paid for 243.29 weeks at the rate of \$204.76 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of September, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Denise E. Tomasic, Kansas City, Kansas
Wade A. Dorothy, Lenexa, Kansas
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director