

The stipulations of the parties are the same as set forth in the award of the administrative law judge, except that the correct number of weeks of temporary total disability benefits that were paid is 2.71 as stipulated at Regular Hearing.

ISSUES

The administrative law judge found claimant entitled to permanent partial general disability benefits based upon a forty seven percent (47%) work disability. The respondent and insurance carrier believe the administrative law judge has erred in this proceeding. The issues now before the Appeals Board are:

(1) Nature and extent of disability.

(2) Whether fringe benefits should be included in the computation of average weekly wage in light of the decision of District of Columbia v. Greater Washington Board of Trade, 506 U.S. ___, 113 S. Ct. 580 (1992).

(3) How does one compute temporary partial disability benefits for award purposes?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds, as follows:

(1) The finding of the administrative law judge that claimant is entitled to permanent partial general disability benefits based upon a forty seven percent (47%) work disability should be affirmed.

The claimant is 35 years old and has obtained her GED. The claimant has attended one year of business college taking classes in accounting, computers, and business. The claimant began work at Wichita Arms, Inc., on May 5, 1984. While in respondent's employ, claimant performed the duties of bookkeeper and executive secretary.

In December of 1991, the claimant began experiencing sharp pain and numbness in her shoulders and arms and cramping and swelling in her arms and hands. Claimant notified her boss who told her to seek medical treatment. For purposes of this proceeding, April 23, 1993, is to be used as the date of accident as claimant's injuries are the result of repetitive mini-trauma and that is the last day claimant worked for respondent.

Claimant was first seen by Bernard Poole, M.D. and eventually referred to board certified orthopedist, Harry A. Morris, M.D. Dr. Morris specializes in treatment of the upper extremities and diagnosed tendinitis and carpal tunnel syndrome. On August 18, 1993, Dr. Morris determined that claimant had reached maximum medical improvement and gave her a rating of ten percent (10%) permanent impairment of function to both upper extremities which is the equivalent of a twelve percent (12%) whole body impairment. Dr. Morris believes that claimant should be restricted to occupations that are sedentary or light, and that she should avoid continuous finger manipulations and handling activities. Dr. Morris believes that claimant's work activities permanently aggravated her condition.

The claimant was also seen by board certified physiatrist, Lawrence R. Blaty, M.D. for an independent medical examination on June 26, 1993. Dr. Blaty diagnosed mild carpal tunnel syndrome, myofascial cervical and soft tissue overuse syndrome of the neck and shoulders. Dr. Blaty believes that claimant's work activities were a substantial factor in her injuries and disability and recommends restrictions of no repetitive heavy lifting, no repetitive overhead work with extension no more than four to five times per hour, no lifting

greater than twenty five pounds occasionally, and no lifting greater than ten pounds overhead. The claimant was also advised to avoid repetitive gripping, squeezing and twisting with her hands. Dr. Blaty believes claimant has a twelve percent impairment of function rating to the whole body according to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, (Revised).

The claimant was interviewed and evaluated by vocational rehabilitation expert James Molski. Mr. Molski has been a vocational rehabilitation consultant since 1971. Mr. Molski has served as a vocational rehabilitation counselor and also is a vocational rehabilitation vendor. He was employed with Kansas Vocational Rehabilitation Center for 11 1/2 years. Mr. Molski believes that claimant has lost 65-70% of his ability to perform in the open labor market based upon the restrictions of Dr. Morris and 60-65% of the same ability based upon the restrictions of Dr. Blaty. Mr. Molski believes that claimant has a 44-49% loss of ability to earn a comparable wage, excluding fringe benefits, and a 45-52% loss of ability to earn a comparable wage, including additional compensation items. Mr. Molski believes claimant's restrictions primarily limit her to sedentary and light work leaving very few medium positions available to her. Mr. Molski is of the opinion that claimant could perform most of the duties of a receptionist and earn approximately \$5.00-\$5.50 per hour in that position.

Claimant was also interviewed and evaluated by vocational rehabilitation expert Karen Terrill. Ms. Terrill believes that claimant has experienced a 48% loss of ability to perform work in the open labor market based upon the restrictions of doctors Morris and Blaty. Ms. Terrill also believes that claimant has experienced an approximate 16% loss of ability to earn comparable wage based on her belief that claimant could return to work and earn \$8.16 per hour as an administrative assistant.

Based upon the above, the Appeals Board concludes that claimant has a loss of ability to perform work in the open labor market of sixty percent (60%). This figure is an average of the opinions of labor market loss of experts Molski and Terrill when considering the restrictions of both doctors. The Appeals Board also finds that claimant has a thirty four percent (34%) loss of ability to earn comparable wage. This figure is an average of the wage loss figures provided by the vocational rehabilitation experts of sixteen percent (16%) and fifty two percent (52%). In the instant case, the Appeals Board finds that the loss of access to the open labor market and loss of ability to earn comparable wage should be given equal weight, and, therefore, that claimant has experienced a work disability of forty seven percent (47%). This analysis is in accordance with the decision of Hughes v. Inland Corporation, 247 Kan. 407, 422, 799 P.2d 1011 (1990), wherein the Kansas Supreme Court held that permanent partial general disability is determined by the extent (percentage) of the reductions of an employee's ability to perform work in the open labor market and the employee's ability to earn comparable wages. The court held that both factors must be considered in light of the employee's education, training, experience, and capacity for rehabilitation. In Schad v. Hearthstone Nursing Center, 16 Kan App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991), the Court of Appeals adopted the requirements of Hughes and held that some type of mathematical equation must be used although it was not error to give more weight to one of the factors. In the instant case, the Appeals Board finds that averaging the two factors is appropriate as there exists no compelling reason to do otherwise.

(2) The respondent argues that the value of additional compensation items should not be included in the computation of average weekly wage due to the holding in District

of Columbia v. Greater Washington Board of Trade, 506 U.S. ___ 113 S. Ct. 580 (1992). The Appeals Board does not agree and finds that the value of "additional compensation" items are to be included in the computation of average weekly wage pursuant to K.S.A. 44-511.

In District of Columbia v. Greater Washington Board of Trade the employer sued the District of Columbia and mayor to enjoin enforcement of the District of Columbia Workers' Compensation Equity Amendment Act section which required employers who provide health insurance to continue benefits to injured employees eligible for workers' compensation benefits that was equivalent to the health insurance provided to other employees. The Supreme Court held that the Employee Retirement Income Security Act (ERISA) preempted the section in question and, therefore, it could not be enforced.

The Kansas Workers Compensation Act provides that an employee's "wage" should be construed to mean both "money" and "additional compensation" received for services rendered to an employer. K.S.A 44-511(a)(3). "Additional compensation" is defined to include, among other items, the value of certain discontinued employer-paid benefits. K.S.A. 44-511(a)(2)(e).

Although the respondent and insurance carrier make a strong argument that the rationale of District of Columbia, supra, is applicable, the Appeals Board finds that the law considered in that case is readily distinguishable from the provisions of the Kansas wage statute in question. The Appeals Board finds that our Kansas statute is not sufficiently related to ERISA to be pre-empted by that federal law. Should the Kansas statute have any affect upon an ERISA plan, direct or indirect, it would tenuous, at best. See Halifax Packing Co. v. Coyne, 482 U.S. 1, 107, S.Ct. 2211, 96 L.Ed. 2d 1 (1987) and Mackey v. Lanier Collection Agency and Service, Inc., 46 U.S. 825, 108 S.Ct. 2182, 100 L.Ed. 2d 836 (1988), and Shaw v. Delta Airlines, Inc., 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed. 2d 490 (1983), wherein the United States Supreme Court found that a state law may relate to an ERISA plan without affecting it and thereby avoid preemption.

(3) The 115.73 hours of temporary partial disability benefits that respondent paid claimant during the pendency of this claim represents the equivalent of 2.41 weeks which is the correct figure to be used in calculating claimant's award.

K.S.A. 44-510e(a) provides, as follows:

"If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks."

Although the workers compensation act limits the number of weeks that temporary partial and permanent partial disability benefits may be paid, it is silent in the method and manner that temporary partial is to be considered for purposes of computation of an award. In this proceeding, the respondent and insurer have paid claimant a total of \$721.42 representing 115.73 hours of temporary partial disability benefits. As neither of these

amounts can be utilized in the mathematical formula for computing an award, we must convert one of the amounts to weeks.

The Appeals Board finds that the proper method to convert the temporary partial paid into a weekly equivalent is to divide the total sum of permanent partial disability benefits paid, or \$721.42, by the weekly temporary total disability benefit rate, or \$299.00. Using this method, the weekly equivalent of the temporary partial disability benefits paid in this proceeding is 2.41 weeks.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the award of Administrative Law Judge Shannon S. Krysl awarding claimant benefits based upon a forty seven percent (47%) work disability should be, and hereby is, modified, as follows:

Based upon the average weekly wage of \$462.11 and date of accident of April 23, 1993, the claimant is entitled to 2.41 weeks of temporary partial disability benefits at the rate of \$299.00 per week totaling \$720.59; 2.71 weeks of temporary total disability at the rate of \$299.00 per week, or \$810.29; followed by 409.88 weeks at \$144.76, or \$59,334.23 for a 47% permanent partial general body disability making a total award of \$60,865.11.

As of August 8, 1994, there would be due and owing to the claimant 2.41 weeks of temporary partial compensation totalling \$720.59; 2.71 weeks of temporary total compensation at \$299.00 per week totalling \$810.29; plus 62.45 weeks permanent partial compensation at \$144.76 per week in the sum of \$9040.26 for a total due and owing of \$10,571.14 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$50,293.97 shall be paid at \$144.76 per week for 347.43 weeks, or until further order of the Director.

All other orders of the Administrative Law Judge as set forth in her Order of March 4, 1994, are adopted by the Appeals Board and incorporated by reference as if fully set forth herein.

IT IS SO ORDERED.

Dated this ____ day of August, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Joseph Seiwert, Attorney for Claimant, 2628 S. Oliver, Wichita, KS 67210
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Shannon S. Krysl, Administrative Law Judge
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