

Additional issues were raised before the Administrative Law Judge but were neither appealed to nor argued to the Appeals Board. As such, the Appeals Board finds the Award of the Administrative Law Judge, with regard to those issues not appealed to the Appeals Board, is herein affirmed in all respects, insofar as they are not in contravention of the opinions expressed herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

At the pre-hearing settlement conference held on September 21, 1994, the parties stipulated that claimant had suffered an eleven percent (11%) permanent partial impairment of function to the body as a whole as a result of the injuries. The issue regarding claimant's request for work disability remained undecided.

K.S.A. 44-510e(a) states in part:

“The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. 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 and based on the third edition, revised, of the American Medical Association Guidelines for the Evaluation of Physical Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.”

Claimant, a truck driver and part-time mechanic for respondent, was injured on July 16, 1993, while loading a tractor at a farm. While cinching down the rear of the tractor, a cheater bar came loose from the boomer, spinning claimant around and slamming the left side of his body into the trailer. Claimant contacted the respondent, advised him of the injury, was referred for medical treatment and was taken off work for a period of time.

Claimant was referred to Dr. William A. Bailey, a board-certified orthopedic surgeon, for treatment of his injuries. Dr. Bailey treated claimant from August 12, 1993 until December 8, 1994. In April 1994, Dr. Bailey permitted claimant to return to part-time employment, four (4) hours per day, which claimant did. On May 19, 1994, Dr. Bailey released claimant to return to full-time work, in a light-duty capacity, which claimant worked until June 1994. In mid-June 1994, Dr. Bailey released claimant to full-time regular work. Unfortunately, in early July 1994, due to a lack of work, the respondent reduced claimant's work hours to six (6) hours per day. In September 1994, the claimant left the employment of the respondent with the specific reason for claimant's departure being contested between the claimant and respondent. Claimant alleged he was not specifically fired, but was simply told he was no longer welcome at the respondent's place of business. Respondent alleged claimant voluntarily terminated his employment for a better job.

Claimant worked for a construction company for approximately one (1) week in late September 1994, but was unable to tolerate that employment beyond the week's time. In October 1994, claimant commenced driving for a school bus company and also performed some light-duty maintenance work on the busses, including oil changes, checking tires, etc. He worked approximately twenty to thirty (20-30) hours per week, both driving and performing maintenance work on the busses.

Awarding claimant a functional impairment only in this matter, the Administrative Law Judge cited Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), as controlling. In Foulk, the claimant was offered a comparable wage job which was within her physical restrictions and claimant refused same. The Court of Appeals found that to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable when the proffered job is within the worker's ability and the worker had refused to even attempt the job. The legislature clearly intended for the worker not to receive compensation where the worker was capable of earning nearly the same wage. Further, it would be unreasonable to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system. *Id.* at 284.

In the instant case, claimant was both offered and accepted employment with respondent at a comparable wage. Unfortunately, this comparable wage job did not continue as respondent was either incapable or unwilling to continue claimant in this limited capacity. Claimant appears to have left his employment with respondent on September 21, 1994.

The Appeals Board finds the application of Foulk to this factual situation as inappropriate. Here, claimant did not refuse employment, as in Foulk, but instead was denied employment when the respondent could no longer meet his specific restrictions. As such, the Appeals Board finds this matter is more closely analogous to the Court of Appeals decision in Lee v. Boeing Military Airplanes, 21 Kan. App. 2d 365, 899 P.2d 516 (1995). In Lee, the respondent returned claimant to work, at an accommodated position, for a period of time, followed by an economic layoff. In Lee, the Court found permanent partial disability compensation in excess of functional impairment payable to the employee when the employee ceases earning ninety percent (90%) of his or her pre-injury wage. It is not the intent of the legislature to deprive an employee of work disability benefits after a high paying employer discharges him or her as part of an economic layoff or where the employer was accommodating the injured employee at a higher wage than the employee could earn elsewhere. The Court, in Lee, went on to find that the presumption of work disability set out in K.S.A. 1992 Supp. 44-510e(a), may be applied as to one period of time and overcome as to a later period: for example, after an accommodated worker is laid off, the presumption may be overcome. *Id.* at Syl. #4.

In applying Lee to the current situation, the Appeals Board finds claimant is entitled to the stipulated eleven percent (11%) functional impairment through his last day worked on September 21, 1994. Subsequent to September 21, 1994, claimant would be entitled to a work disability pursuant to K.S.A. 44-510e. In considering claimant's loss of a task performing ability, the Appeals Board notes an evaluation was provided by Mr. Dick Santner indicating claimant had suffered a forty-two percent (42%) loss of task performing ability. This evaluation information was then provided to Dr. Bailey, who agreed with the assessment made by Mr. Santner and adopted his percentage of loss of ability to perform tasks. Dr. Bailey's opinion was based upon permanent restrictions prohibiting claimant from lifting more than thirty to forty (30-40) pounds. Dr. Bailey further restricted claimant from long term sitting and stooping, as well as reaching and bending.

The evidence in the file indicates claimant had worked one (1) month in his current job and was paid a total of five hundred forty-five dollars (\$545.00). This computes to a weekly wage of one hundred twenty-five dollars and seventy-seven cents (\$125.77). When compared to claimant's stipulated average weekly wage of two hundred fifty-three dollars and fifty-eight cents (\$253.58), this computes to a wage differential of fifty percent (50%). K.S.A. 44-510e requires that claimant's loss of ability to perform work tasks be averaged with the differential in claimant's average weekly wage at the time of the injury and the average weekly wage claimant is earning after the injury. A forty-two percent (42%) task loss, when averaged with a fifty percent (50%) wage loss, computes to a forty-six percent (46%) work disability and the Appeals Board so finds and adopts same as appropriate in this instance. The additional findings of the Administrative Law Judge, so long as they are not in contravention with this Award, are affirmed and adopted by the Appeals Board.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer, dated May 31, 1995, shall be, and is hereby, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ken Howard, and against the respondent, Kansas Tractor, uninsured, for an injury occurring on July 16, 1993, to his low back and legs. Claimant is entitled to 40 weeks temporary total disability compensation at the rate of \$169.06 per week in the sum of \$6,762.40. Claimant is entitled to an additional 6 weeks temporary partial disability compensation at the rate of \$93.99 in the sum of \$563.94, plus 3 weeks temporary partial disability compensation at the rate of \$56.46 in the sum of \$169.38. The Administrative Law Judge, in computing the temporary partial disability compensation, found it to be equal to 4.34 weeks temporary total disability compensation and this finding was not appealed to the Appeals Board. As such, the Appeals Board adopts the Administrative Law Judge's method of computation of the temporary partial disability compensation in this case.

If permanent partial disability benefits are paid based upon a functional impairment, as when claimant has returned to work for respondent, followed by a period when claimant is no longer employed by respondent, at 90% of his wage, thus gaining entitlement to a work disability, then the payment calculation will necessarily modify. The new disability rating will be calculated based upon 415 weeks (less a deduction for any temporary total disability payable for over 15 weeks) and the number of weeks of permanent partial benefits paid, based upon the lower functional rating, will be credited against the amounts due. The disability rating based on claimant's work disability, if higher than the functional rating, becomes the ceiling for the benefits awarded. In this matter, claimant was awarded an 11% functional followed thereafter by a 46% work disability. The 46% work disability becomes the award ceiling, with respondent being given credit for the 11% functional disability. As such, after deducting the appropriate temporary total disability benefits above calculated, claimant would be entitled to 177.40 weeks permanent partial disability at the rate of \$169.06 per week, totalling \$29,991.24, for a total award of \$37,486.96.

As of November 14, 1995, claimant would be entitled to 44.34 weeks temporary total disability compensation (temporary total and temporary partial combined) at the rate of \$169.06 per week totalling \$7,496.12, followed thereafter by 77.23 weeks permanent partial work disability at the rate of \$169.06 per week in the amount of \$13,056.50, for a total of \$20,552.62, which is due and owing in one lump sum minus amounts previously paid. Thereafter, claimant would be entitled to 100.17 weeks permanent partial disability

at the rate of \$169.06 per week in the amount of \$16,934.74, until fully paid or further order of the Director.

Claimant is entitled to future medical treatment upon proper application to and approval by the Director. Claimant's entitlement to the payment of authorized medical and hospital expenses are awarded pursuant to the Award of the Administrative Law Judge, findings 4 and 5.

Claimant's contract of employment with his attorney is a part of the record and claimant's attorney is granted a lien against the proceeds of this award pursuant to the provisions of K.S.A. 44-536 as amended by the 1993 Kansas Legislature.

The fees necessary to defray the expense of the Workers Compensation Act are assessed against the respondent as follows:

Hostetler & Associates, Inc.	\$538.80
Braksick Reporting Service	\$774.85
Richard Kupper & Associates	\$244.00
Appino & Biggs Reporting Service	\$117.70

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Jan L. Fisher, Topeka, Kansas
- Eugene C. Riling, Lawrence
- Alvin E. Witwer, Administrative Law Judge
- Philip S. Harness, Director