

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSEPH A. MILLER)	
Claimant)	
VS.)	
)	Docket No. 183,175
UNITED PARCEL SERVICE)	
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the Award dated July 16, 1996, entered by Administrative Law Judge Bruce E. Moore. The Appeals Board heard oral argument on January 16, 1997.

APPEARANCES

Richard A. Boeckman of Great Bend, Kansas, appeared for the claimant. Jerry M. Ward of Great Bend, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a 24.6 percent work disability for a stipulated July 31, 1991, accident. Respondent and its insurance carrier requested the Appeals Board to review the issue of claimant's average weekly wage and the nature and extent of claimant's disability. Those are the only two issues before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

The Award entered by the Administrative Law Judge should be modified.

(1) The Appeals Board agrees with the Administrative Law Judge's conclusion that claimant's average weekly wage should include the weekly values of the medical insurance and pension benefits which respondent provided on the date of accident and later discontinued. Therefore, the Appeals Board adopts the Administrative Law Judge's finding that claimant's average weekly wage is \$499.96 which is comprised of \$317.44 per week for base wage, \$95.52 per week for medical insurance, and \$87 per week for pension contribution.

Respondent and its insurance carrier argued that claimant's average weekly wage should not include additional compensation items because claimant voluntarily terminated his employment. The Appeals Board disagrees. Voluntary termination does not preclude additional compensation items from being included in the average weekly wage computation. The statute governing the computation, K.S.A. 1991 Supp. 44-511, provides that additional compensation is included in the average weekly wage when it is discontinued. Other than requiring discontinuance, the statute does not otherwise limit the inclusion of additional compensation items in the average weekly wage computation.

(2) The Appeals Board finds that claimant has a 46 percent permanent partial general disability for which he should be compensated.

The Appeals Board adopts the Administrative Law Judge's analysis and conclusion that claimant has a 35 percent loss of ability to perform work in the open labor market. Vocational rehabilitation expert James T. Molski testified claimant had a 15 to 20 percent loss of ability to perform work in the open labor market utilizing the restrictions provided by Dr. C. Reiff Brown for the back and a three to five percent loss utilizing the recommendations provided by Dr. J. Mark Melhorn for the upper extremities. The Administrative Law Judge combined those percentages and found the combination of Dr. Brown's and Dr. Melhorn's restrictions produced a 21.5 percent loss of ability to perform work in the open labor market. Mr. Molski also testified claimant had a 60 to 65 percent loss of ability to perform work in the open labor market utilizing the medical restrictions provided by Dr. Revis C. Lewis. Because Dr. Melhorn and Dr. Brown were more familiar with claimant's injuries than Dr. Lewis, the Administrative Law Judge gave twice as much weight to the 21.5 percent loss than to the 60 to 65 percent loss and found that claimant's loss of ability to perform work in the open labor market was 35 percent.

The Appeals Board is not persuaded to disturb that conclusion, finds that it is reasonable, and adopts it as its own.

Under the facts presented, determining claimant's loss of ability to earn a comparable wage is difficult. At the time of his accidental injuries, claimant not only worked part-time for the respondent, approximately 20 hours per week, but also worked approximately 40 hours per week as a plumber's helper for the owner of a plumbing, heating, and air conditioning business. After the accident claimant attempted to return to work for the respondent but was unable to perform his former job duties. Respondent did not offer claimant an accommodated position. Claimant then found a job with Amerine Services as a journeyman plumber where he worked from April 1994 through November 1994 earning approximately \$429.20 per week which included overtime and some insurance benefits.

In the absence of persuasive testimony from a vocational rehabilitation counselor or other expert regarding claimant's loss of ability to earn a comparable wage, the Appeals Board finds an appropriate measure to assess such loss is to compare the hourly rate claimant was earning while working part-time for the respondent with the hourly rate he retained the ability to earn after the accident as indicated by the wages he earned working as a plumber for Amerine Services. Based upon the \$499.96 average weekly wage determined above, claimant earned approximately \$25 per hour working for the respondent. While working for Amerine Services, claimant earned \$429.20 per week comprised of \$366 regular time, \$23.20 overtime, and \$40 for insurance benefits which represents approximately \$10.73 per hour. Comparing \$25 to \$10.73 yields a loss of 57 percent which the Appeals Board finds appropriate in this instance to gauge claimant's loss of ability to earn a comparable wage as a result of the back and bilateral upper extremity injuries.

In the instant case, the Appeals Board finds that the Administrative Law Judge properly excluded claimant's tax records regarding the rental property owned by claimant and his wife. Respondent contends any profit generated by the rental properties should be considered in claimant's post-injury ability to earn comparable wages. The Appeals Board disagrees with the respondent's contentions and finds claimant's tax records are not relevant to determine his post-injury ability to earn wages as that term is defined by the Act. K.S.A. 1991 Supp. 44-511(a)(3) provides:

"The term 'wage' shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment."

Conversely, profits and losses from business operations are the excess of receipts over expenditures and may not represent the actual cash flow of the enterprise or the financial benefit derived by its owners. Many factors other than an individual's physical and mental abilities determine the extent of an enterprise's success. Profits and losses from rental property are distinct and different from wages and, in this instance, are irrelevant in determining claimant's post-injury wage earning abilities. However, any transferrable skills acquired from engaging in those activities are relevant in determining post-injury wage earning potential.

Because his is an "unscheduled" injury, the computation of permanent partial general disability is governed by K.S.A. 1991 Supp. 44-510e which provides in 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. . . . 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."

Because claimant has not earned post-injury wages comparable to those he was earning on the date of accident, the presumption of no work disability contained in the above statute does not apply. Averaging claimant's 35 percent loss of ability to perform work in the open labor market and the 57 percent loss of ability to earn a comparable wage yields an approximate 46 percent work disability upon which the Appeals Board finds appropriate to base claimant's award.

(3) The Appeals Board hereby adopts the Administrative Law Judge's findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore dated July 16, 1996, should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Joseph A. Miller, and against the respondent, United Parcel Service, and its insurance carrier, Liberty Mutual Insurance Co., for an accidental injury which occurred July 31, 1991, and based upon an average weekly wage of \$499.96 for 3 weeks of temporary total disability compensation at the rate of \$289 per week or \$867, followed by 412 weeks of temporary total disability compensation at the rate of \$153.33 per week or \$63,171.96 for a 46 percent permanent partial disability, making a total award of \$64,038.96.

As of February 15, 1997, there is due and owing claimant 3 weeks of temporary total disability compensation at the rate of \$289 per week or \$867, followed by 286.43 weeks of permanent partial disability compensation at the rate of \$153.33 per week in the sum of \$43,918.31, for a total of \$44,785.31, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$19,253.65 is to be paid for 125.57 weeks at the rate of \$153.33 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Richard A. Boeckman, Great Bend, KS
Jerry M. Ward, Great Bend, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director