

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

DAVID LYNN HEARD, JR.)
 Claimant)
VS.)
))
HCA WESLEY MEDICAL CENTER)
 Respondent)
 Self-Insured)
))
AND)
))
KANSAS WORKERS COMPENSATION FUND)

Docket No. 187,099

ORDER

The respondent appeals from an Award entered by Administrative Law Judge Shannon S. Krysl on March 15, 1996. The Appeals Board heard oral arguments August 14, 1996.

APPEARANCE

Claimant appeared by his attorney, Timothy J. King of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Vaughn Burkholder of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, James R. Roth of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record listed in the Award and has adopted the stipulations listed in the Award.

ISSUES

The sole issue to be considered by the Appeals Board is the nature and extent of claimant's disability. The Administrative Law Judge found claimant has a 63.5 percent work disability. Respondent contends that the Award should be limited to functional impairment on the grounds that claimant has deliberately removed himself from the local labor market by returning to school. Claimant, on the other hand, now argues for a higher work disability. Claimant contends that the Administrative Law Judge made an error when she relied upon claimant's ability to earn wages to determine the wage loss factor for work disability instead of actual wage loss.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In reviewing the records and considering the arguments of the parties, the Appeals Board finds claimant should be awarded benefits based upon a 93.5 percent work disability and the Award of the Administrative Law Judge should be modified.

Claimant developed bilateral carpal tunnel syndrome from his work as a painter and paper hanger. After a period of conservative treatment, Dr. George Lucas performed surgical decompression in June 1994. Claimant was thereafter limited to a light duty level of work. The medical evidence indicates and the Appeals Board finds claimant was, as a result of restrictions from work-related injuries, unable to return to his previous employment.

Claimant has not sought any employment and instead has opted to return to school. He chose to return to school, in part, because of his pre-existing multiple sclerosis. His letter explaining the reasons for returning to school indicates that he felt the need to be re-educated so that when his multiple sclerosis became more debilitating he would be able to find sedentary employment.

K.S.A. 44-510e states the test for work disability as follows:

"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. . . . 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."

Respondent urges application of principles stated in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994). The Court of Appeals there held that when a claimant refuses to even attempt an offered job within his/her restrictions, the claimant should be limited to an award based upon functional impairment only. The Appeals Board has indicated that this rationale should also be applied in cases where a claimant has removed himself/herself from the labor market without good cause.

The Appeals Board concludes that the rationale of Foulk v. Colonial Terrace should not apply in the circumstances of this case. Language of K.S.A. 44-510e suggests that the wage loss prong is based upon what the claimant is actually earning after the injury. The Foulk decision authorized a deviation from the language of the statute in limited circumstances. As the Appeals Board understands the Foulk decision, it requires an element of bad faith on the part of the claimant to warrant application of the Foulk rationale. In addition, there was not an actual offer of employment after the injury.

The respondent asserts that the evidence does point to bad faith on the part of the claimant. Following the injury, respondent gave claimant certain tests for the purposes of considering re-employment in another position. Claimant failed those tests. Respondent suggests the failure of the tests was a deliberate attempt to avoid an offer of employment. In support of the argument, respondent points to claimant's performance in his current educational program and high grade point average he is earning. Respondent's vocational expert, Karen Terrill, also testified that claimant should have been able to pass pre-employment tests.

The Appeals Board concludes the evidence falls short of substantiating respondent's argument. The record includes nothing more than the very general indication of the nature of the tests. The record also contains no indication of the reason claimant failed those tests. We cannot conclude, as respondent urges, claimant deliberately failed those tests to avoid an offer of accommodated employment.

This Board also considers it inappropriate to rely upon the opinions of vocational experts regarding claimant's ability to earn post-injury. The legislature changed the test for work disability, effective July 1, 1993. The new test relies, in part, upon the difference between what the claimant is earning and what claimant was earning before the injury. The statutory definition deleted and replaced the "ability" language in the statute prior to July 1993. In the current statutory version, we find no support for relying upon vocational expert opinions regarding claimant's ability to earn wages under the circumstances.

We find the difference between claimant's weekly wage at the time of injury and the average weekly wage the claimant is earning to be 100 percent. The Appeals Board agrees with and affirms the finding of the Administrative Law Judge that the claimant has an 87 percent loss of ability to perform the tasks in his previous fifteen-year work history. This conclusion is based upon the opinion of Dr. Lucas who applied his work restrictions to job tasks prepared by Karen Terrill.

K.S.A. 44-510e requires that the task loss and wage loss be averaged to determine work disability. In this case the result is a 93.5 percent work disability. The Appeals Board therefore finds that claimant should be awarded benefits based upon the 93.5 percent work disability and the Award of the Administrative Law Judge should be modified.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Shannon S. Krysl dated March 15, 1996, should be, and hereby is, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, David Lynn Heard, Jr., and against the respondent, HCA Wesley Medical Center, a self-insured, for an accidental injury which occurred April 24, 1994, for 44 weeks of temporary total disability compensation at the rate of \$313 per week or \$13,772.00, followed by 275.49 weeks of permanent partial disability compensation at \$313 per week or \$86,228.00 for a 93.5 percent whole body disability not to exceed the statutory limit of \$100,000.

As of December 31, 1996 there is due and owing claimant 44 weeks of temporary total disability compensation at the rate of \$313 per week or \$13,772 followed by 96.29 weeks of permanent partial disability compensation at the rate of \$313 per week or \$30,138.77 for a total ordered paid and owing of \$43,910.77 which is due in one lump sum less any amounts previously paid. The balance of \$56,089.23 is to be paid at the rate of \$313 per week until fully paid or further order of the Director.

The Appeals Board approves and adopts the orders of the Administrative Law Judge relating to unauthorized medical expenses, future medical expense, attorney fees, and Administration expenses.

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Timothy J. King, Wichita, KS
Vaughn Burkholder, Wichita, KS
James R. Roth, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director