BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES C. BAUMAN	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 199,815
GOODYEAR TIRE & RUBBER COMPANY	)	& 199,816
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant appeals the Award of Administrative Law Judge Jon L. Frobish dated June 5, 1998, wherein the Administrative Law Judge denied claimant permanent benefits, beyond medical compensation, applying K.S.A. 44-501(c).

APPEARANCES

Claimant appeared by his attorney, Jan L. Fisher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Bret C. Owen of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Larry G. Karns of Topeka, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) Does the failure of claimant to be off work for one week bar his claim for workers compensation benefits pursuant to K.S.A. 44-501(c) and Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996)?

(2) What, if any, is the nature and extent of claimant's injury and/or disability?

(3) Is claimant entitled to future medical treatment?

(4) Is K.S.A. 44-501(c) unconstitutional and in violation of the equal protection clause of the 14th Amendment of the United States Constitution?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Claimant suffered accidental injury arising out of and in the course of his employment with respondent on June 21, 1993, and again on January 19, 1994. While claimant was provided medical treatment for both of these injuries, claimant missed no work as a result of either of these injuries, and continues working for respondent. Claimant has transferred from working in the warehouse to the less physically demanding job of driving a forklift.

Claimant acknowledges that he missed no work as a result of these injuries, but argues that the transfer to the lighter job constitutes a modification of the work at which he was employed and, therefore, claimant avoids the application of K.S.A. 44-501(c).

With regard to the injury on June 21, 1993, claimant's argument fails. Claimant returned to work with respondent at his regular job, earning a comparable wage, and continued working until the January 19, 1994, accident. At no time did claimant miss work. Therefore, with regard to the June 21, 1993, date of accident, K.S.A. 44-501(c) is applicable, and claimant is entitled to medical treatment only.

Following the accident on January 19, 1994, claimant did change jobs. It is claimant's testimony, and the Board so finds, that this job change occurred as a result of the injuries suffered on January 19, 1994, and before. Claimant bid to, and was assigned, a forklift driver's job, which is substantially easier than the job claimant was performing at the time of his injuries.

K.S.A. 44-501(c) will not hold an employer liable under the Workers Compensation Act with respect to an injury which does not disable the employee for a period of at least one week from earning full wages "at the work at which the employee is employed." Claimant changed jobs in order to accommodate his limitations. This job change is sufficient to allow claimant to avoid the application of K.S.A. 44-501(c). Therefore, the

Appeals Board finds the limitations of K.S.A. 44-501(c) do not apply to the injury of January 19, 1994.

In considering the medical evidence in the record, the Appeals Board finds that claimant is entitled to a 5 percent permanent partial impairment to the body as a whole for the January 1994 date of accident. This is based upon the opinion of Lance Malmstrom, D.C., who treated claimant for several years, and who assessed claimant a 20 percent impairment, but found 10 percent of that to be preexisting. Dr. Malmstrom then divided the remaining 10 percent, attributing 5 percent to the 1993 accident and 5 percent to the 1994 accident.

The Appeals Board further finds claimant may be entitled to future medical treatment for this injury upon application to and approval by the Director.

Claimant contends K.S.A. 44-501(c) is unconstitutional. The Appeals Board has held and continues to find that the question as to the constitutionality of statutes is not one for the Appeals Board to consider. The Appeals Board will continue to uphold the constitutionality of a statute until a court of competent jurisdiction finds to the contrary.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated June 5, 1998, should be, and is hereby, modified, and the claimant, James C. Bauman, is granted an award against the respondent, Goodyear Tire & Rubber Company, its insurance carrier, Travelers Insurance Company, and the Kansas Workers Compensation Fund for an injury occurring on January 19, 1994, and based upon an average weekly wage of $812.21, for a 5 percent permanent partial impairment to the body as a whole on a functional basis.

Claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of $313 per week in the amount of $6,494.75, all of which is due and owing at the time of this Award, and ordered paid in one lump sum minus amounts previously paid.

Claimant is entitled to unauthorized medical care up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical will be awarded upon proper application to and approval by the Director of Workers Compensation.

Claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent, its insurance carrier and the Kansas Workers Compensation Fund as follows:

Nora Lyon & Associates	
Transcript of Regular Hearing	$202.05
Appino & Biggs Reporting Service	
Deposition of Tammy Marie Zobel	$178.20
Deposition of Lance Malmstrom, D.C.	$265.00
Eugene L. Dolginoff & Associates, Ltd.	
Deposition of Preston Brent Koprivica, M.D.	$486.50
Curtis, Schloetzer, Hedberg, Foster & Associates	
Deposition of Dr. Michael Poppa	$565.75
Deposition of Mark McCoy, D.C.	$557.35

IT IS SO ORDERED.

Dated this ____ day of January 1999.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENT

The undersigned Appeals Board member respectfully dissents from the opinion of the majority with regard to the January 19, 1994, date of accident. Claimant contends entitlement to a permanent partial disability based upon the injuries suffered on January 19, 1994, even though claimant continued working and acknowledged missing no work. Claimant's justification for entitlement to an award contrary to K.S.A. 44-501(c) is

that claimant transferred to a forklift driving job, which better fit claimant's limitations after the injury.

The undersigned would dispute this finding for several reasons. The record indicates claimant attempted to transfer to this job and, in fact, worked this job prior to suffering the injury in question. In addition, claimant continued working his regular job for one full year after the accident of January 1994. The job change did not occur until January 1995.

In both Boucher, *supra*, and Osborn v. Electric Corp. of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. ___ (1997), the claimants were limited in their ability to continue performing their regular jobs.

In Boucher, the claimant argued he could no longer lift as he had in the past and had trouble both working and driving, which should, therefore, avoid the application in K.S.A. 44-501(c). In Osborn, the claimant argued that he transferred from field work to supervisory duties due to his physical limitations. In both situations, the claimants continued working for their respective respondents at a comparable wage. In both instances, the Court of Appeals applied the language of K.S.A. 44-501(c) and denied the claimants benefits for having failed to meet the requirements of K.S.A. 44-501(c).

In considering the evidence in the record, this Appeals Board member would find K.S.A. 44-501(c) applicable to this case and claimant should be precluded from receiving benefits beyond his medical treatment.

In addition, this Appeals Board member would find claimant has not proven a 5 percent functional impairment resulting from the January 1994 injury. While Dr. Malmstrom does assess a portion of his 20 percent to the January 1994 accident, no other doctor agrees with this assessment. Dr. Koprivica assessed claimant a 22 percent whole body functional impairment, but found the January 1994 accident to be a temporary aggravation of claimant's preexisting conditions. Dr. McCoy found claimant suffered no permanent increase as a result of the January 1994 date of accident. Dr. Michael Poppa found claimant to have suffered an 18 percent whole body functional impairment, but felt claimant's work incidents were temporary aggravations only of claimant's preexisting arthritis. He opined claimant suffered no permanent functional impairment resulting from his work-related incidents.

A preponderance of the credible evidence supports a finding that claimant has suffered no permanent functional impairment as a result of the January 19, 1994, accident.

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
Bret C. Owen, Topeka, KS
Larry G. Karns, Topeka, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director