

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

BRYAN E. WHELAN)	
Claimant)	
VS.)	
)	Docket No. 202,839
CITY OF ST. PAUL)	
Respondent)	
AND)	
)	
CIGNA WORKERS COMP)	
Insurance Carrier)	

ORDER

Claimant appeals from an Award of Administrative Law Judge John D. Clark dated December 2, 1996, wherein Judge Clark granted claimant a 6.5 percent permanent partial general body disability on a functional basis based upon an average weekly wage of \$89.65, finding claimant to be a part-time volunteer fireman.

APPEARANCES

Claimant appeared by and through his attorney, Patrick C. Smith of Pittsburg, Kansas. Respondent and its insurance carrier appeared by and through their attorney, John I. O'Connor of Pittsburg, 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) What is the nature and extent of claimant's injury and/or disability?
- (2) What is claimant's average weekly wage?
- (3) Was claimant a full-time or part-time volunteer employee?
- (4) Whether K.S.A. 44-501(c) as applied in Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198 (1996) bars claimant's recovery for permanent partial disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire evidentiary record, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board will first consider respondent's contention that claimant should be denied any benefits with the exception of medical expenses for failure to prove that he was disabled for a period of at least one week from earning full wages under K.S.A. 44-501(c) and the holding of Boucher v. Peerless Products, Inc.. K.S.A. 44-555b states in part:

"The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."

The Appeals Board has held in the past and continues to hold that issues not presented to the Administrative Law Judge are not properly before the Appeals Board pursuant to K.S.A. 44-555b(a). As such, whether claimant's entitlement to benefits is controlled by Boucher is not an issue which the Appeals Board will consider without said issue being first presented to the Administrative Law Judge.

The remaining issues, including the nature and extent of claimant's injury and disability, claimant's average weekly wage, and whether or not claimant is a full-time or part-time employee, are issues which will be decided together as they all hinge upon the interpretation of the same facts in this matter.

Claimant was a volunteer firefighter with the City of St. Paul and had worked in this capacity as a volunteer for nearly two years prior to February 6, 1994, the date of accident. Claimant carried a beeper which, when sounded, would alert him to an emergency. While claimant was encouraged to attend every emergency situation, there was no legal obligation for claimant to attend. Over the approximate two-year time before claimant's

injury, there were recorded 72 separate incidents of which claimant attended 30. These incidents ranged from such simple circumstances as parades and fireworks watches, tornado and storm watches, meetings and training sessions, to actual fires. The records placed into evidence indicated that of the 72 incidents 32 involved record keeping of actual time spent at the task. Of these 32 entries involving actual time, claimant attended 14. During the 26-week period prior to claimant's injury, there were 27 incidents of which claimant attended 15. Of these 27 incidents 13 included actual time recorded. In addition to the time sessions, there were several entries involving meetings which claimant indicated averaged two to three hours each. During the two years prior to claimant's injury there were 20 meetings consisting of two to three hours each. During the 26 weeks preceding claimant's injury there were five such meetings. If the Appeals Board considers the two- to three-hour estimate of claimant to be appropriate, then, of the 72 incidents, time can be computed on 52. Of the 27 incidents in the 26 weeks preceding claimant's injury, time can be computed on 18.

The evidence in the record also provides information on a multitude of ways volunteer or part-time firefighters are paid in the area. In claimant's instance there was no specific pay involved. Claimant did indicate it was his initial understanding he was to be paid \$10 per run. This is consistent with testimony indicating certain small towns in the area did pay their volunteer firefighters \$10 per run. Other evidence in the record indicates part-time firefighters in one location were paid \$7.23 per hour. Finally, evidence regarding full-time firefighter pay, including benefits, from at least two separate locations in southeast Kansas was provided for consideration.

It should be noted that during the entire time claimant was working as a volunteer firefighter he also worked a full-time, 40-hour per week job at the local Co-op and, subsequent to the date of injury, continued to do so.

The fact that claimant carried a beeper which announced emergencies was not an indication that claimant should be considered a full-time employee. Claimant was free to respond or not respond to the incidents as his circumstances dictated. It is obvious over the two-year period with 72 incidents and claimant only attending 30 claimant was not under any legal obligation to attend any percentage of the functions or incidents. As such the Appeals Board cannot find claimant was a full-time employee and he will be compensated as a part-time volunteer employee. In computing claimant's average weekly wage the Appeals Board must look to K.S.A. 44-511(b)(6)(A) which states:

"The average gross weekly wage of a person serving on a volunteer basis as a duly authorized law enforcement officer, an ambulance attendant, mobile intensive care technician, firefighter, or any other volunteer under the workers compensation act, who receives no wages for such services, or who receives wages which are substantially less than the usual wages paid for such services by comparable employers to employees who are not volunteers, shall be computed on the basis of the usual wages paid by the

employer for such services to employees who are not volunteers, or, if the employer has no employees performing such services for wages who are not volunteers, the average gross weekly wage shall be computed on the basis of the usual wages paid for such services by comparable employers to employees who are not volunteers. Volunteer employment shall not be presumed to be full-time employment.”

In deciding how to compute claimant’s average weekly wage the Appeals Board has been handed a myriad of possibilities. The Administrative Law Judge found the \$7.23 per hour paid to the part-time firefighters of the City of Chanute to be appropriate. In considering how to apply this hourly rate the Appeals Board must consider several options. If considering the actual time recorded during the 26 weeks preceding the injury, the firefighters actually spent 43.65 hours attending the various incidents. Claimant attended 28.5 hours of the total time recorded. If the entire 43.65 hours is considered as the basis for claimant’s average weekly wage then claimant would have a \$12.14 per week wage. If only the 28.5 hours actually attended by claimant is considered for the 26-week period then claimant has a \$7.93 per week wage. If the Appeals Board considers an appropriate payment to be the \$10 per run as used by several volunteer fire companies in the area, then the 27 runs during the 26-week period preceding claimant’s injury would equate to an average weekly wage of \$10.38. If only the 15 runs attended by claimant is considered then claimant’s average weekly wage for the 26 weeks would be \$5.77. If considering the 72 total incidents of which claimant attended 30 this computes to a 42 percent attendance rate. If computing the 27 incidents during the 26-week period preceding the accident with the 15 that claimant attended, this computes to a 56 percent attendance rate. If considering the 43.65 hours of actual time computed in the 26 weeks preceding the accident with the 28.5 attended by claimant this computes to a 65 percent attendance rate.

Regardless of whether the Appeals Board considers the actual time spent by claimant at the various activities or compares the number of incidents attended and uses either the \$10 per run pay method or the \$7.23 per hour pay method, claimant’s average weekly wage falls far short of the \$89.65 per week wage utilized by the Administrative Law Judge. K.S.A. 44-511(b)(6)(B) states:

“The average gross weekly wage of any person performing community service work shall be deemed to be \$37.50.”

The evidence in the record fails to support a finding that claimant’s average weekly wage, under any computation method, would exceed \$37.50 per week when considering the total time spent and the number of incidents attended. The Appeals Board therefore finds the appropriate wage to be utilized in this case is the minimum wage set forth in K.S.A. 44-511 for persons performing community service work. As such the Appeals Board finds claimant’s average weekly wage to be \$37.50 per week.

In considering the nature and extent of claimant's injury and/or disability the Appeals Board must look to K.S.A. 44-510e which 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."

Claimant was examined and/or treated by two different physicians. Dr. William L. Dillon, a board-certified orthopedic surgeon, examined and treated claimant beginning August 1994. Claimant was diagnosed with a herniated disc at L5-S1 and restricted from heavy lifting or bending. Dr. Dillon rated claimant at a 10 percent functional impairment to the body as a whole. Claimant was also seen by Dr. Kevin D. Komes for an independent medical examination. Dr. Komes utilized a functional capacities evaluation done in March 1995 in reaching his opinion. Dr. Komes, in reading the EMGs, found no evidence of L5-S1 radiculopathy. He also found that a myelogram performed on claimant showed no evidence of impingement on the nerve roots although he did note a bulging disc at L5-S1. He rated claimant at a 3 percent functional impairment to the body as a whole. The Administrative Law Judge in reviewing the opinions of both physicians found that applying equal weight to both was appropriate and awarded claimant a 6.5 percent impairment of function to the body as a whole. The Appeals Board, in reviewing both the opinions of Dr. Dillon and Dr. Komes, agrees that there is no justification for giving greater weight to one opinion over the other and affirms the 6.5 percent functional impairment to the body as a whole as being an appropriate award in this matter.

In considering claimant's entitlement to a work disability the Appeals Board must look to the opinion of the physicians for claimant's tasks loss as required by K.S.A. 44-510e(a). Considering his limitations Dr. Komes felt claimant was within five pounds of being completely in the heavy category under the Dictionary of Occupational Titles (DOT). The functional capacity evaluation done on claimant indicated claimant displayed the ability to lift 95 pounds which was 5 pounds short of a DOT heavy category listing. Dr. Komes opined that claimant could be returned to work at his grain elevator job handling 50-pound bags of grain with no restrictions. In attempting to elicit an opinion regarding claimant's ability to perform work tasks that claimant performed during the 15 years preceding the incident, the information provided to Dr. Dillon was at best sparse. There is no discussion on the record or is there any indication that Dr. Dillon was provided information regarding the specific work tasks performed by claimant in either present or past employment. The only information was a generic question by claimant's counsel as to whether claimant discussed with Dr. Dillon his present and past jobs that he had held. The doctor was then

asked to give a percentage of those jobs which claimant could perform in light of his restrictions. The doctor provided a relatively ambiguous 20 to 30 percent "in that kind of work." The doctor was then asked whether 20 or 30 percent of those jobs were still available to him or whether 70 percent of the jobs were still available to him. The requirement of K.S.A. 44-510e, specifically with the loss of ability to perform work tasks, was not considered by Dr. Dillon. Therefore, a competent medical opinion by a physician as to the claimant's loss of ability to perform work tasks was not provided for the Appeals Board's consideration.

In workers compensation matters the burden of proof as defined by K.S.A. 44-508(g) is placed squarely upon the claimant to persuade the trier of facts by a preponderance of the credible evidence of claimant's right to an award of compensation. See *also* K.S.A. 44-501. Claimant's burden of proving entitlement to work disability has not been met in this instance and pursuant to K.S.A. 44-510e claimant is limited to his functional impairment of 6.5 percent to the body as a whole.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated December 2, 1996, should be, and is hereby, modified and an award is granted in favor of the claimant, Bryan E. Whelan, and against the respondent, City of St. Paul, and its insurance carrier, CIGNA Workers Comp, for an accidental injury sustained on February 6, 1994.

Claimant is entitled to 26.98 weeks permanent partial compensation at the rate of \$25 per week based upon an average weekly wage of \$37.50 for a total award of \$674.50 which, as of the date of this award, is all due and owing and ordered paid in one lump sum minus amounts previously paid.

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

Schaefer Court Reporting	
Deposition of William Lonnie Dillon, M.D.	\$238.00
Heather A. Lohmeyer, C.S.R.	
Deposition of Tim K. Hay	unknown
Deposition of Clayton Standley	unknown
Deposition of Howard S. Budreau	unknown
Deposition of Keith Shaffer	unknown
Don K. Smith & Associates	
Telephonic deposition of Dr. William L. Dillon	\$117.50

Martin D. Delmont, C.S.R. Deposition of Connie L. McCune	\$117.00
Debra D. Oakleaf, C.S.R. Transcript of regular hearing	\$156.20
Patricia K. Smith, C.S.R. Deposition of Kevin Komes, M.D.	\$121.50

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Patrick C. Smith, Pittsburg, KS
- John I. O'Connor, Pittsburg, KS
- John D. Clark, Administrative Law Judge
- Philip S. Harness, Director